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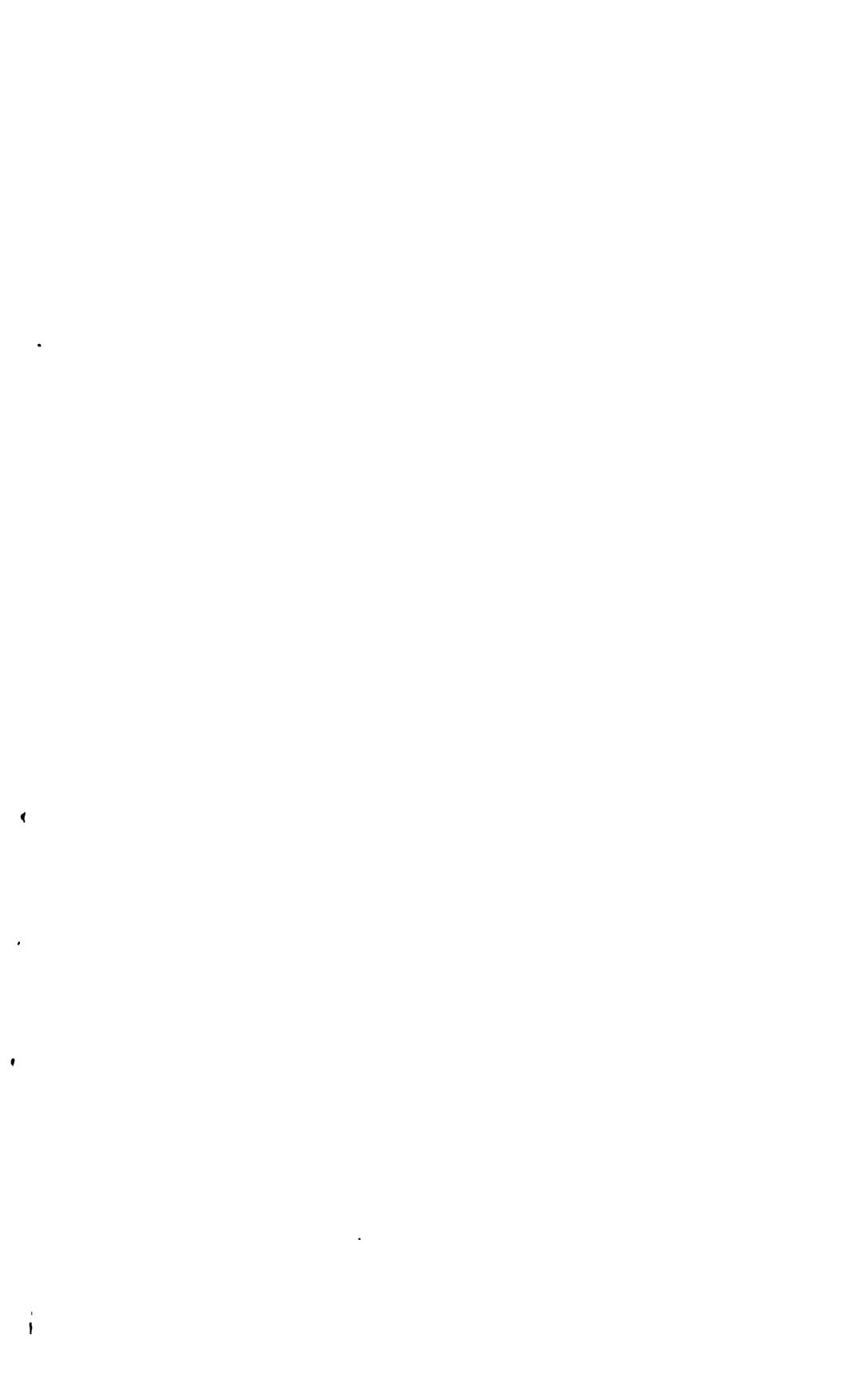
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43

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
AND IN THE
COURT FOR THE CORRECTION OF ERRORS
OF THE
STATE OF NEW YORK.

BY JOHN L. WENDELL,
COUNSELLOR AT LAW.

VOLUME XXI.

ALBANY:
PUBLISHED BY GOULD, BANKS & GOULD,
LAW BOOKSELLERS 104 STATE STREET,
AND BY BANKS, GOULD & CO.
LAW BOOKSELLERS, NEW YORK:

1846.

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Rec. Sept. 26, 1870

ALEXANDER S. GOULD, PRINTER,
144 Nassau Street, New York.

JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,

DURING THE TIME OF THE TWENTY-FIRST VOLUME OF THESE REPORTS.

SAMUEL NELSON, CHIEF JUSTICE.
GREENE C. BRONSON, } JUSTICES.
ESEK COWEN, }

CIRCUIT JUDGES.

FIRST CIRCUIT,
OGDEN EDWARDS.

SECOND CIRCUIT,
CHARLES H. RUGGLES.

THIRD CIRCUIT,
JOHN P. CUSHMAN.

FOURTH CIRCUIT,
JOHN WILLARD.

FIFTH CIRCUIT,
PHILO GRIDLEY.

SIXTH CIRCUIT,
ROBERT MONELL.

SEVENTH CIRCUIT,
DANIEL MOSELY.

EIGHTH CIRCUIT,
NATHAN DAYTON.

WILLIS HALL, ATTORNEY GENERAL.*

* Appointed by the legislature 4th February, 1839, in place of SAMUEL BEARDSLEY, Esq. whose term of service had expired.

A

TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

⌈ The letter v. follows the name of the plaintiff.

A			
Acker v. Burrall,	605	Brackett v. Watkins,	68
Allen, Welch v.	147	Brinkerhoff, Utica S. & R. Co. v.	139
— v. Jaquish,	628	Brizsee v. Maybee,	144
Anderson v. Coonley,	279	Brockway, Chappel v.	157
— v. Harker,	372	Brooks v. Rennie,	14
Arthur, Rogers v.	598	Brown, Buckbee v.	110
		—, ex parte,	316
		—, Jenkins v.	454
		Buck, Odell v.	142
		Buckbee v. Brown,	110
		Buffalo Bank v. Boughton,	57
		Bunts, Rhodes v.	19
		Burlingham v. Belding,	463
		Burr v. Mills,	290
		Burrall, Acker v.	605
		Bush, Miller v.	651
		Butterfield, Russell v.	300
B		C	
Babcock, The Bank of Salina v.	499	Caswell, The People v.	86
Baker, Newland v.	264	Camden & Amboy R. R. Co. v. Bel-	
Baley, Farrington v.	65	knap,	354
Ball v. Shell,	222	Campbell, Sherrill v.	287
— v. Gardner,	270	City Fire Insurance Company v. Corlies,	367
Barnard v. Viele,	88	Chappel v. Brockway,	157
Barnes v. Cole,	188	Chautauque Co. Bank v. Davis,	584
— v. Henshaw,	426	Christie, Halsey v.	9
Barrel, Simonton v.	362	Clark, Smith v.	83
Beddoe's ex'r v. Wadsworth,	120	Clark v. Faxton,	153
Belding, Burlingham v.	463	Coddington, Yale v.	175
Belknap, The Camden and Amboy R.			
R. Co. v.	354		
Bender, The Utica Bank v.	643		
Bennett v. Earl,	117		
Bindon, Webb v.	98		
Blanchard v. Ely,	342		
Boorman & Johnston, Oakley v.	588		
Booth, Hinman v.	267		
Boughton, Buffalo Bank v.	57		

TABLE OF CASES.

vii

M			Petrie v. Feeler, -	172
			Piper v. Manny, -	282
			Prime, Hewitt v. -	79
McArthur v. Huribert, -	190		Prosser v. Woodward, -	205
McCheaney, The Troy Turnpike and R. Co. v. -	296			
McGraw, Peet v. -	667			
McMorris v. Simpson, -	610	R		
McNair, The People v. -	608		Rathbun, The People v. -	509
Manny, Piper v. -	282		Raynor, Newcomb v. -	108
Mason, Nicholl v. -	339		Reed, Griffith v. -	502 ^m
Maxwell v. Palmerton, -	407		Remer, Donner v. -	10
Maybee, Brizsee v. -	144		Rennie, Brooks v. -	14
Mazuzan v. Mead, -	285		Rhodes v. Bunts, -	19
Mead, Mazuzan v. -	285		Richards, Fay's adm'r's v. -	636
Merritt, Leo Wolf v. -	336		Richardson v. Gere, -	156
Miller v. Bush, -	651		Robinson, ex parte, -	672
Mills, Hanna v. -	90		Rogers v. Arthur, -	598
—, Burr v. -	290		Roper, Hartfield v. -	615
—, Couch v. -	424		Ross v. Sadgbeer, -	166
Moore, Wright v. -	230		Rugar, Downing v. -	178
Morrell, The People v. -	563		Russell, Edwards v. -	63
Morris v. Scott, -	281		Russell v. Butterfield, -	300
Moulton v. Kavana, -	648		Rust, Hanna v. -	149
N				
Newcomb, Williams v. -	67	S		
— v. Raynor, -	108		Sadgbeer, Ross v. -	166
Newland, Foster v. -	94		Salina Bank v. Babcock, -	499
— v. Baker, -	264		Scott, Morris v. -	281
Newton, Wakeman v. -	260		Sea Ins. Co. v. Fowler, -	600
Nicholl v. Mason, -	339		Seixas, Hart v. -	40
North's adm'r's v. Pepper, -	636		Service, Swart v. -	36
O			Shannon v. Comstock, -	457
Oakley v. Van Horn, -	305		Shell, Ball v. -	222
— v. Boorman & Johnston, -	588		Sherrill v. Campbell, -	237
Odell v. Buck, -	142		Simonton v. Barrell, -	362
Oneida C. P. The People v. -	20		Simpson, McMorris v. -	610
Orange County Bank v. Dubois, -	351		Small, The Herkimer M. & H. Co. v. -	273
Osborn, White v. -	72		Smith, Connolly v. -	59
Otis v. Jones, -	394		Smith v. Clark, -	83
P			Smith v. Talcott, -	202
Palmerton, Maxwell v. -	407		Smith, Thorn v. -	365
Peck, Young v. -	389		Smith, Franklin v. -	624
Peet v. McGraw, -	667		Stanton, Eddy v. -	255
People, The, v. Caswell, -	86		Stearns, The People v. -	409
—, v. Davis, -	309		Steele v. Whipple, -	103
—, v. Irvin, -	128		Stewart v. Hawley, -	552
—, v. McNair, -	608		Stowits v. Bank of Troy, -	186
—, v. Morrell, -	563		Swart v. Service, -	36
—, v. Rathbun, -	509	T		
—, v. Stearns, -	409		Talcott, Smith v. -	202
—, ex rel. Fuller, v. Oneida C. P. -	20		Tallman's adm'r, Hills v. -	674
—, ex rel. Taylor, v. Thompson, -	235		Thompson, The People ex rel. Taylor, v. -	235
Pepper, North's adm'r's v. -	636		Thorn v. Smith, -	365
			Troy, Bank of, Stowits v. -	186
			Troy Turnpike & R. Co. v. McCheaney, -	296
			Trumbull v. Healy, -	670
			Tubbs, Gardenier v. -	169

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW-YORK,
IN JANUARY TERM, 1839—IN THE SIXTY-THIRD YEAR OF THE INDEPENDENCE
OF THE UNITED STATES.

HALSEY vs. CHRISTIE.

An *attachment* issued by a justice of the peace, founded upon an affidavit not sufficient to confer *jurisdiction*, is no bar to an action by a *mortgagee* of personal property against the plaintiff in the attachment for the taking of the property; and the latter cannot avail himself of the fact that *possession* did not accompany the *mortgage*.

ERROR from the Tompkins C. P. The plaintiff held a *mortgage* of personal property executed to him by a person of the name of *Grose*, the property remained in the possession of *Grose*, and was seised by virtue of an *attachment* sued out by the defendant against his property. The plaintiff brought an action of *trover* against the defendant who justified under the attachment. It appeared that the *affidavit* upon which the attachment issued was radically defective. The court charged the jury that the plaintiff could not avail himself of the defect in the affidavit, and that if they should find that the mortgage was fraudulent and void as against creditors, the plaintiff was not entitled to recover.

 Downer v. Remer.

The jury found a verdict for the defendant. The plaintiff having excepted to the charge of the court, sued out a writ of error.

G. D. Beers, for the plaintiff in error.

G. G. Freer & S. Love, for the defendant in error.

By the Court, NELSON, Ch. J. The charge of the court was clearly erroneous. As between the mortgagor and mortgagee, the mortgage was a valid security, and vested the property in the mortgagee; and then the affidavit being admitted to be defective, the justice had not jurisdiction to issue an attachment which would enable the party suing out the same to take the usual ground in these cases, to wit, that the mortgage was executed in fraud of creditors.

Judgment reversed; *venire de novo*; costs to abide the event.

 DOWNER vs. REMER, impleaded, &c.

25 *Wend* 620. Notice of protest sent by mail directed to the town where the party resides is sufficient, although there be several post offices in the same town, unless it appear that the holder knew that it should be directed in a different manner; or now by statute, unless the party when affixing his signature to a bill or note specifies thereon the post office to which notice must be addressed.

Where the sum specified in a notice of protest varies from the true sum, it is for a jury to say, whether the party has or has not been misled.

THIS was an action of assumpsit tried at the Wayne circuit before the Hon. DANIEL MOSELEY, one of the circuit judges.

The defendant was sued as the endorser of a promissory note made by one James Young, for the sum of \$560, dated 20th April, 1835, payable at the Chemung Canal Bank at *Elmira*, eighteen months after date, with interest after six months from date. On 22d October, 1836, when the note came to maturity, payment was demanded at the Chemung Canal Bank, by the teller thereof, and notice of demand and non-payment was deposited in the post office at *Elmira*,

Downer v. Remer.

directed to the defendant *Remer*, at *Benton*, *Yates county*, the place of his residence. The words *Benton*, *Yates county*, were placed under the defendant's name upon the note after the endorsement, but not by the defendant. The notice sent by the teller was produced in court, and three witnesses, on looking at it, testified that it stated the amount of the note which had been protested to be *nine* hundred and ninety-nine dollars fifty-two cents. The teller testified that he read the same *five* hundred and ninety-nine dollars fifty-two cents, being the *principal* and *interest* of the note, and that it was so intended, but said it might be read *nine* hundred, &c.; he, however, testified that at the time the note fell due, there was no other note in the Chemung Canal Bank with the defendant's name upon it. The defendant proved that when the notice was sent there were *three post offices* in the town of *Benton*; one called *Benton*, distant six miles from the residence of the defendant; another, *West Dresden*, distant three and a half miles from the defendant's residence; and the third, *Benton centre*, within two miles of the defendant's residence. He also proved that he was in the habit of receiving his letters and papers at the *Penn Yan* post office, which was within two and a half miles of his residence. The notice sent by the teller was received at the *Benton post office*, and remained there until December, when it was sent by the post master to the defendant.

The counsel for the defendant requested the judge to charge the jury that due notice of demand and non-payment had not been given; that the notice should have been sent to the post office *nearest* to the residence of the defendant, or where he usually resorted to obtain his letters and papers; and secondly, if sent to the proper office, that it was insufficient, being calculated to mislead. The judge refused so to charge, and submitted the question to the jury whether the notice of protest was sufficient to apprise the defendant of the dishonor of the note; and as to the *place* to which the notice was sent, he observed that upon the plaintiff's showing, the notice was sufficient, it having been directed to *Benton*, *Yates county*, where the defendant resided, and he

Downer v. Remer.

referred it to the jury to decide whether under all the proof on that subject the notice had been directed to the proper place. The jury found for the plaintiff, and the defendant now asks for a new trial, for the misdirection of the jury.

J. A. Spencer, for the defendant.

H. Welles, for the plaintiff.

By the Court, BRONSON, J. The statute declaring a notice of non-payment sufficient, directed to a city or town where the person sought to be charged by such notice resided at the time of drawing, making or endorsing a bill of exchange or promissory note, Statutes, sess. of 1835, p. 152, being passed after the making of this note, cannot aid the plaintiff on the question whether the notice of non-payment was properly directed.

Notice of the dishonor of a bill or note should be so given that it will be likely to reach the drawer or endorser without delay. Where the parties reside in different towns, the notice may be sent by mail; and then it should be directed to a post office in the town where the drawer or endorser resides, or to some other post office where he usually receives his letters. If there be more than one post office in the town where the drawer or endorser resides, the notice should be directed to that nearest his residence, unless he usually resorts to another. *Cuyler v. Nellis*, 4 Wendell, 398, and the cases there cited.

In this case, the notice would have been good had it been directed to *Penn Yan*, where the defendant usually received his letters, or to *Benton Centre*, the office nearest to him in the town where he lived. But it was directed to *Benton*, an office to which the defendant did not resort, and which was the most distant from him of any of the three offices in the town. Still the notice would have been sufficient, if, after diligent inquiry, it had been directed according to the best information that could be obtained. *Chapman v. Lipscombe*, 1 Johns. R. 294. *Bank of Utica v. Davidson*, 5 Wendell, 587. *Catskill Bank v. Stall*, 15 id. 364. But

Downer v. Rorer.

there was no proof that any diligence whatever had been used. The words "Benton, Yates county," were written under the defendant's name after he had endorsed the note; but when, or by whom it was done, did not appear; and there was no evidence that the person who left the note for collection, or the bank officers, made any inquiry for the purpose of ascertaining the proper direction to be given to the notice, or that they acted on any information that had been previously acquired. For aught that appears, the person who directed the notice may have known that there were three post offices in the town of *Benton*, and that the notice was sent to the office most remote from the residence of the endorser. He may also have known that the endorser usually received his letters at the *Penn Yan* office.

Where there are several post offices in the same town, I think the holder should not be held to very strict proof in excusing a misdirection of the notice; but I am unable, especially since the case of *Cuyler v. Nellis*, 4 Wendell, 398, to say that no diligence whatever should be required. But my brethren are of a different opinion. They say that the case of *Cuyler v. Nellis* has not been followed—that it is enough to send notice to the town where the drawer or endorser lives, unless it appear that the holder knew that the notice should have been directed in a different manner. The objection that the notice was misdirected is consequently overruled.

The note with the interest added was misdescribed by mistake in the notice of protest, as amounting to \$999,52, instead of \$599,52; but in all other respects it was accurately described, and it was the only note in the bank with the defendant's name upon it. The jury were well warranted in finding that the defendant was not misled by the error, and if not misled the notice was sufficient. *Bank of Rochester v. Gould*, 9 Wendell, 279. *Smith v. Whiting*, 12 Mass. R. 6. Chitty, jun. on Bills, 71.

New trial denied.

Brooks v. Bryce.

BROOKS vs. BRYCE & RENNIE.

A *factor* or purchasing agent, in actual possession of two parcels of goods obtained under distinct orders, for both of which he is in advance, although paid for one of the parcels, may avail himself of the doctrine of *lien* in respect to the whole of the property.

It seems that though only one of the parcels had come to hand, and he had been paid his advances on it, he might still have set up a *lien* upon the parcel received for his *liabilities* incurred in respect to the other parcel.

The acceptance of a draft payable at a future day, in payment of one parcel, is not a waiver of the *lien* of the factor, especially when in the receipt of the draft it is declared that it is to be in full *when paid*.

ERROR from the superior court of the city of New-York. This was an action of *trover*, for fourteen rollers for printing calicoes, brought by Bryce & Rennie against Brooks. In the autumn of 1833, Brooks, at the request, it seems, of Bryce & Rennie, sent two distinct orders to a correspondent in Manchester, England, to have a quantity of rollers prepared and engraved and forwarded to him in New-York, with all possible dispatch. The orders were received, duly attended to, and the rollers shipped for New-York. The first parcel, consisting of the fourteen rollers for which the action was brought, arrived at New-York about the middle of February, 1834. The whole were paid for by Brooks. On the 11th March, Bryce & Rennie gave Brooks a draft at four months on a house in Philadelphia, for \$1623,62, the cost of the first parcel and the charges thereon, and Brooks gave a receipt for the draft, which, *when paid*, to be in full for the invoice of the first parcel. The second parcel came to hand about a month after the arrival of the first, but whether *before* or *after* the giving of the draft does not very distinctly appear from the bill of exceptions. The cost of the second parcel was £132 4s. 1d. sterling. After the giving of the draft, Bryce & Rennie demanded the first parcel of rollers, which Brooks refused to deliver *unless security was given* for the cost of the second parcel. Bryce & Rennie were proprietors of works for printing calicoes, and it seems that the rollers were intended for their operations in the *spring*.

Brooks v. Bryce. •

The plaintiffs' works were destroyed by fire on the 24th March, whereby they became insolvent. In July the draft given to Brooks was duly paid, and in the same month this suit was commenced. In *August* following both parcels of rollers were sold by Brooks to other calico printers, after notice to Bryce & Rennie, and brought about their full value. The chief justice charged the jury that *at the time of the demand* the property in the first parcel of rollers was vested in the plaintiffs, and that the defendant had not such a *lien* upon that parcel as to entitle him to retain and hold the same against the plaintiffs. The defendant excepted to the charge, and the jury having found a verdict for the plaintiffs, judgment was entered in their favor. The defendant sued out a writ of error.

J. Coit, for the plaintiff in error.

J. Prescott Hall, for the defendants in error.

By the Court, COWEN, J. In considering this case, I shall assume that the rollers secondly ordered had arrived, and were actually in the hands of the defendant, when the plaintiffs made the demand of the rollers in question. They do not pretend that any available demand could be made till they had given the bill of March 11th; and the testimony is conflicting, and if the fact were material, it should, therefore, have been left to the jury, whether the rollers secondly ordered had so arrived. Indeed, the counsel for the plaintiffs below did not deny on the argument, that the fact must be taken to have been so; and accordingly admitted it. The second subdivision of the second written point of the plaintiff in error is in these words; "The second parcel of rollers were actually received when the demand for the rollers in suit was made." According to my notes, when the counsel for the plaintiff in error called our attention to this, it went off on the admission of the opposite counsel that it was correct.

Now I do not intend to admit, that if the rollers secondly ordered had only been on their way from Manchester, in the

• Brooks v Bryce.

hands of the defendant's carrier, or even if the second order had merely reached Manchester, and could not be revoked, the lien for the whole would not have attached on both parcels, the same as if the second had been in the hands of the defendant. In the one case, a possession by the defendant's carrier would have been his possession; and in the other, as he stood necessarily in advance, and the last rollers would arrive for ought we see, to answer about the same purposes of spring business as the first, it would be difficult to collect any agreement by the defendant to waive his right of *general lien*, if he otherwise had any on their actual arrival. *Hodgson v. Payson*, 3 Harr. & John. 339. *Jourdain v. Le Fevre*, 1 Esp. R. 66. *Stevens v. Robins*, 12 Mass. R. 180, 182. These cases show that a factor or purchasing agent may retain for liabilities incurred, as well as for actual advances.

But I assume, as the case and counsel seem to have done throughout, that the rollers secondly ordered had arrived; and we then have a foreign purchasing factor in actual possession of two parcels of rollers, under distinct orders from his principals, for both of which he is in advance, and for one of which he has been paid, setting up and enforcing a general lien. I say a *foreign* purchasing factor within the rule which makes a bill of exchange drawn on another of the United States a foreign bill. I suppose this makes no difference, for the lien of a domestic factor or agent is the same, Paley on Agency, 110; 1 Black. R. 654; but it brings the defendant below in all respects within the English books which declare the general lien of a factor. Paley on Agency, 109. *Green v. Farmer*, 1 Black. R. 651, 654.

What is this *general lien*, as contradistinguished from a *particular lien*? The *first* is a right of the factor to hold all the goods of his principal which come into and remain in his hands as such factor, until the general balance, that is to say, all debts which his principal owes him, and which have arisen and become payable in the course of his business as factor, have been paid. LORD MANSFIELD, in *Godin v. London Assur. Co.*, 1 Burr. 494, and the cases there cited.

Hodgson v. Payson, 3 Har. & John. 242. I state the rule under the qualification understood to be applicable to an attorney, who has a general lien on the effects of his client. *Montagu on Lien*, 32, 59, and the cases there cited. *Grah. Pr.* 59, 60, 2d ed., and cases there cited. *Stephenson v. Blakelock*, 1 Maule & Selw. 535. Whereas, a *particular lien*, is confined to the debt due for the specific article, as we see in ordinary sales for cash. It makes no difference; therefore, merely that the *property* in the rollers first ordered had passed at the time of demand. The right of general lien still continues till the factor parts with the possession, 1 Burr. *ut supra*, unless there be some arrangement between the parties incompatible with the idea of lien.

Had the debt been due to the defendant for the *first parcel only*, and not for the second, as if there had been a credit given for the latter, this would have made the lien particular on each for the price of each; and so if there had been an agreement to deliver the first without payment for the second. The right of lien is given by the law, and may be waived by an agreement either express or plainly to be implied from circumstances: as where the obligation to pay for another parcel is extended by stipulation, or by the receiving of a note or bill of exchange generally at a long credit, not yet expired. *Stevenson v. Blakelock*, 1 Maule & Selw. 535. Otherwise if the bill be short, and especially if protested before the possession of the goods be parted with. *Id.* The counsel for the defendants in error insists that one or the other of these facts was established in proof. He says, 1. "That the terms and dates of the orders, and the nature of the importation, it being to answer the spring trade, and to be executed with all haste, show that the understanding was that each parcel was subject to no other lien than for its own price." It seems to me that the circumstances, so far from leading to such an inference as a necessary one, which alone could warrant the strong direction of the learned judge, would scarcely form a case for the jury. That the importation was to be hastened with a view to the spring business, is not at all incompatible with the idea that the payment by the plaintiffs was also to be

Brooks v. Bryce.

hastened, to be prompt, and fortified by the security of a general lien. That a delivery for the spring business would precede even the month of April, does not appear. The case cited of *Williams v. Littlefield*, 12 Wend. 362, 370, was of a plain agreement by the purchasing agent to procure and deliver the goods on a credit, though the agreement was inferred from various circumstances.

Then it is said, 2. "That the defendant accepted a *negotiable* security, payable at a future day, and thereby waived his lien on the parcel in suit by thus giving a credit." That the bill was negotiable, if that be material, I do not perceive. It is recited in the receipt at the foot of the invoice, and mentioned in the testimony of Brooks as being produced; but it is neither set out in *hæc verba*, nor any where mentioned as being negotiable. Be this as it may, it was not, by the very terms of the receipt, to operate as payment except on the condition of being paid. Such a written declaration, which may be taken as that of both parties, is at least far from strengthening the inference, if the other circumstances would tend to it, that even the first parcel was to be taken as paid for before the bill was turned into cash. I admit, however, that the ground taken by the defendant, when the demand came to be made, was strong evidence that he would have been content to consider the bill as an absolute payment, provided he could have been paid for the second parcel. I do not think that any thing more can be inferred from it.

The point raised, that the importations were on separate and distinct orders, and therefore the goods not the subject of general lien, is not compatible with the doctrine of lien, as I understand it, and as I have sought to deduce it from the authorities.

My opinion is, that the judgment should be reversed, and a *venire de novo* go from the superior court.

Judgment reversed.

Rhodes v. Bunts.

RHODES & RIDER vs. BUNTS.

The entry of a *verdict* upon the record different from the actual finding of the jury, though such appears to be the fact by a return to a *certiorari* issued for that purpose, can not be assigned as error; the remedy of the party aggrieved is *by motion* and *not* by writ of error.

Where in *replevin* on a plea of *non cepit* and *property in a stranger*, the jury find a *general verdict* for the plaintiff, an entry upon the record of a finding for the plaintiff upon *both issues* is warranted by the verdict.

ERROR from the Chemung common pleas. *Herman Bunts* sued Rhodes and Rider in an action of *replevin* for taking and detaining a cow. The defendants pleaded severally *non cepit* and *property* in one *Conrad Bunts*, by virtue of an attachment against whom, the cow was taken.—The plaintiff took issue upon the pleas of property. The record stated that the cause was tried by a jury and that they found both issues in favor of the plaintiff, and assessed his damages at 12 cents besides costs, on which verdict, judgment was entered. The defendants sued out a writ of error, and *specially* assigned for error that by the record it appeared that the jury found that the cow was *not* the property of *Conrad Bunts*, but was the property of the *plaintiff*; whereas the jury did not in fact so find; and the defendants prayed a *certiorari* requiring the common pleas to certify the facts. A *certiorari* issued accordingly and the C. P. returned the *minutes of the trial*, whereby it appeared that the jury found for the plaintiff 12½ cents.

A. S. Thurston, for plaintiff in error.

T. North, for defendant in error.

By the Court, NELSON, C. J. It is insisted on the part of the plaintiff in error that the verdict is *imperfect* in not disposing of the *plea of property*, and that consequently the judgment is erroneous. There are two answers to this objection: *first*, the general verdict authorized the entry upon the record of a finding in favor of the plaintiff upon both the

The People v. The Judges of Oneida C. P.

issues, 2 Burr. 688, 6 Wendell, 268, 12 Id. 164; and *secondly* the defendants below cannot in this way contradict the record. If it had been improperly made up, they should have applied on motion to amend it, Bacon's Abr. tit. Error E; 1 Wils. 85; 7 Wendell, 55; 9 Id. 125; 2 Barn. & Cres. 362. The judgment must be affirmed.

Judgment affirmed.

THE PEOPLE, on the relation of Orlando A. Fuller and Mary Fuller, *vs.* THE JUDGES OF ONEIDA COMMON PLEAS.

A *mandamus* does not lie to a court of common pleas, directing the *vacatur* of a rule of that court, setting aside a report of referees, although the common pleas in the decision made by them clearly erred.

A writ of *mandamus* setting forth an appeal from a justice's judgment to a court of C. P., a reference there, a report of referees in favor of the relator, and an order of the court setting aside the report, shows a *prima facie* title to relief, was the remedy appropriate; but the proper remedy in such case is by writ of error and not by *mandamus*.

Pleadings in justices' courts are liberally construed; but still the proof must correspond with the allegation; it was accordingly held, where a suit was commenced in a justices' court against Orlando F. and Mary F. without any intimation in the declaration that the relation of husband and wife existed between them, or that the suit was brought for the recovery of a demand due from the wife *whilst sole*, though it was avowed on the hearing before referees that the suit was for such a demand, that evidence of a *promise by the husband* to pay the demand, was inadmissible under the pleadings in the cause.

DEMURRER to a return to a writ of alternative *mandamus*. The writ of *mandamus* recited that John M. Mott had recovered a judgment against the relators before a justice of the peace, that the relators had removed the cause by appeal into the court of C. P. of Oneida county, where it was referred to three referees pursuant to the statute, that the referees reported that nothing was due to the plaintiff, and that the court on the motion of the plaintiff, set aside the report to the great damage of the relators, &c. The judges were then commanded to vacate their order setting aside the report, or show cause, &c. The judges made a return

The People v. The Judges of Oneida C. P.

to the writ by which it appears that *Mott* brought an action before a justice of the peace against the relators, as "*Orlando A. Fuller* and *Mary Fuller*," and declared "on book account to his damage of fifty dollars." The plaintiff afterwards delivered a bill of particulars which commenced thus—" *Mary Gridley* to *John M. Mott, Dr.*" There was a trial by jury and a verdict for the plaintiff for \$29,46, on which judgment was rendered by the justice. The relators appealed to the C. P., where the cause was referred. The referees reported specially that on the hearing the plaintiff in opening the cause stated that it was an action brought against the defendants, on a book account against *Mary Fuller*, prior to her intermarriage with *Orlando A. Fuller* the other defendant, and offered to prove that *Orlando A. Fuller* had promised to pay the account in question. This evidence was objected to as inadmissible under the pleadings and excluded. The plaintiff having no further evidence, the referees reported that nothing was due to him from the defendants. The C. P. on the plaintiff's motion made an order setting aside the report. To this return the relators demurred, and a joinder in demurrer was put in.

S. Stevens, for relators.

W. C. Noyes, contra.

After advisement the following opinions were delivered :

By BRONSON, J. The declaration was in the usual form for charging the relators as joint contractors. It contained no intimation that the plaintiff sought to recover a debt due from the wife *dum sola*, nor was it alleged that the relation of husband and wife existed between the relators. The bill of particulars was equally defective. Although the pleadings in justices' courts are liberally construed, we cannot wholly overlook matters of form. The declaration must show that the plaintiff has a good cause of action, and on the trial the proof must be confined to such a demand as is set up in the pleading. It is not enough that the defendant

The People v. The Judges of Oneida C. P.

may be able to conjecture the ground on which he is sued ; nor is he bound to know that a plaintiff who declares for a cause of action arising in one form, intends to give evidence of a cause of action arising in another form. The referees decided correctly that the evidence offered by the plaintiff was inadmissible under the pleadings and the court of common pleas erred in setting aside the report.

It is objected that the writ of mandamus is defective—that it does not show any title in the relators to the relief which they seek. *Commercial Bank v. Canal Commissioners*, 10 Wendell, 25. If a mandamus will lie in this case, I think the writ is well enough in point of form. It recites a judgment before the justice, an appeal to the C. P., a reference of the cause and a report of the referees in favor of the relators. On that report the defendants were entitled to judgment. It is true that the court below had power, if any sufficient grounds existed, to order a rehearing ; but the writ makes out a *prima facie* case, one which called upon the court to show on what ground the report was set aside. In the case of the *Commercial Bank* the writ required the canal commissioners to pay over money without showing any right whatever in the relators to receive it. But here the relators show a title, which, if neither denied nor avoided by other matter, is, for most purposes, conclusive.

The relators have another remedy, and that is a ground for denying a mandamus. On a rehearing, if the referees follow the decision of the common pleas and decide against the relators, the question can be put upon the record and reviewed by writ of error. Since the decision of the court for the correction of errors in *The Judges of Oneida v. The People*, 18 Wendell, 79, I think the case of *The People v. Niagara C. P.*, 12 Wendell, 246, ought not to be followed. I do not adopt all the reasoning of Senator Tracy, in the case recently decided, but rest my opinion on the single ground that the relators have another remedy.*

* This case was decided in January term, 1839, since which time the question of the proper office of a writ of *mandamus* has been more fully considered by the court, and the views of Senator Tracy, as expressed in the

 The People v. The Judges of Oneida C. P.

The CHIEF JUSTICE concurred in the above views.

COWEN, J. I agree that the C. P. erred in setting aside the report, and that the mandamus is well enough in point of form, but I cannot bring myself to think it the appropriate remedy. It is true that in *The People, ex rel. Fleming, Niagara C. P.*, 12 Wendell, 246, a peremptory mandamus was granted in a similar case; but the point does not appear to have been taken that there was another mode of relief. This was a case of rejecting testimony as being variant from the declaration. The C. P. thought it should have been received, and therefore set aside the report. The consequence is, if we do not now interfere, that the cause must be reheard, when, the decision of the court forming the law of the case, the testimony must be received, and a decision had upon the merits. If there is enough to sustain the plaintiff's claim, he will have judgment. The court below may then require the referees to report specially their decisions, the testimony, and their reasons for allowing or disallowing any claim, in the manner and for the purpose declared by the statute. 2 R. S. 306, § 48, 49. If the report be confirmed, it is well settled that it may be entered on the record, so far at least as to present the legal questions decided by the court below, and thus form the subject of a writ of error, the same as a special verdict or bill of exceptions. *Feeter v. Heath*, 11 Wendell, 481 to 483. *Melvin v. Leaycraft*, 17 id. 169. The error now in question thus entering into the judgment of the court below, it would be reversed. This is the form in which our judgments are reviewed by the court of errors; and such is nearly the course which a cause takes as to all questions susceptible of being presented by bill of exceptions, when a new trial is granted in a case. The party takes his exceptions on the

case of *The Judges of Oneida v. The People*, 18 Wendell, 79, recognized as laying down the true rule on the subject, as will be seen in an opinion delivered by Mr. Justice Bronson, in *The People, ex rel. Doughty v. The Dutchess C. P.*, 20 Wendell, 658, which, although published previous to the decision of this case, was in fact pronounced subsequently.

The People v. The Judges of Oneida C. P.

new trial, and proceeds by writ of error. Had this been a verdict instead of a report, such would have been the course; and we should have refused to interfere by mandamus for that reason.

It may be said that the court below would be compelled to sign a bill of exceptions, but not to coerce a special report. I do not understand that to be so. On the party moving for a rule under the statute that the referees report specially, I think it would be their duty to grant it; and equally so to enter it on the record, or so much at least as to put their own decision on points of law in a way of review by writ of error. This strikes me as the appropriate and indeed the adequate remedy. If I am right, it follows that a mandamus is unnecessary. This writ is never granted except where justice would fail in its purposes for want of other means. I think the law has provided another and better remedy by writ of error.

But suppose there is no remedy by writ of error, and even supposing *The People, ex rel. Fleming, v. The C. P. of Niagara*, to have been a solemn decision on the point under discussion, I must still be permitted to question our power to interfere, since the decision in the court of errors in *The Judges of Oneida C. P. v. The People*, 18 Wend. 79. In that case the court had directed a peremptory mandamus compelling the court below to vacate an order granting costs on the ground that the title to land came in question. The court of errors reversed the judgment expressly because this court had no jurisdiction. That resolution was based on a very elaborate and able view of our power, by Mr. Senator Tracy, who cited most of the English and American cases. He addressed himself to the proposition that the office of a mandamus is merely to put an inferior court, magistrate or ministerial officer in motion; but that where discretionary or judicial power has been exercised upon a matter within the jurisdiction of the inferior court or magistrate, although in making the decision the tribunal has mistaken either the law or the fact, or both, and whether there be a remedy by writ of error, certiorari, &c. or not, this court cannot compel a change of determination by man-

The People v. The Judges of Oneida C. P.

damus. I shall not go over the cases which the learned senator so ably reviewed, and from the decided balance of which I concur that the rule proposed was fairly deduced by him. It is enough to say that the resolution of the court of errors denying all jurisdiction to this court in a case which it was not denied did or might involve a mere question of law, in a case too where no other remedy than mandamus could be imagined, is fully commensurate with the conclusion to which he came. It is true that *The People, ex rel. Fleming, v. The Niagara C. P.* was not cited and expressly overruled, but *The People v. The Superior Court of New York*, 5 Wendell, 114, and 10 id. 285, was reviewed and condemned, and that was a stronger case for a mandamus than the present. The court there compelled the vacatur of the rule for a second trial, granted on the ground of newly discovered evidence, for which there clearly was no other remedy, not even by bill of exceptions; for that would reach only the competency of the new evidence. Besides, Senator Tracy expressly adopted *Ex parte Morgan*, 2 Chit. R. 250, which denied that a mandamus would lie to compel the court below to grant a new trial, and yet no writ of error would lie in that case, whether the motion was founded on matter of practice or the improper admission or rejection of testimony, unless the party had taken the precaution to tender a bill of exceptions. He also adopted the broad language of Abbott, Ch. J. in *The King v. The Justices of Middlesex*, 4 Barn. & Ald. 300, denying that a mandamus can be allowed to compel an inferior court to come to any particular decision.

For one, if I have not entirely mistaken the scope of the decision in *The Judges of the Oneida C. P. v. The People*, I shall not feel myself warranted in consenting to a mandamus for the purpose of disturbing any judicial decision whatever of an inferior court or magistrate.

I am, therefore, of opinion that the demurrer in the case at bar is well taken.

Judgment for the defendant.

White v. Delavan.

JOHN G. WHITE vs. DELAVAN.

A defect in form in a declaration or other pleading is cured by pleading over ; but not a defect in substance.

LIBEL. The declaration in this case is substantially the same as in *William White v. Delavan*, 17 Wendell, 49. The defendant put in two pleas of justification, to which the plaintiff demurred. It was admitted on the argument that the pleas were bad, but it was insisted that the defendant was notwithstanding entitled to judgment inasmuch as the declaration was radically defective. In answer to which it was urged that by pleading over, the defects in the declaration were cured, and that consequently judgment ought to be rendered for the plaintiff.

S. Stevens, for the plaintiff.

B R. Wood, for the defendant.

By the Court, COWEN, J. The declaration in *White v. Delavan*, 17 Wendell, 49, was held *bad in substance*, because the plaintiff being but one of a class, and not named, he could not, in the nature of the libel, apply it to himself. In other words, it was a libel upon nobody, because none of the class were named. It is different in *Fidler v. Delavan*, 20 Wendell, 57, because there the plaintiff was named ; and undoubtedly any defect of form in identifying him would be cured by pleading over, as the chief justice said in that case. He cited the authorities to that point, and they are now pressed upon us by the plaintiff's counsel as showing that pleading over is to have the same effect here.

One of those cases is *Beale v. Simpson*, Lutw. 626, 627, where the plaintiff sued in right of his wife as administratrix during the minority of M. S. and others. The defendant pleaded and the plaintiffs replied. The defendant demurred to the replication, and then would have gone back and attacked the declaration for not specifying the precise age of

White v. Delavan.

M. S., &c. and that they were under 17 years. But this was not allowed. That was no more than saying you shall not go back on matter of form, but should have demurred specially; for their ages were alleged, though informally. Besides, the case is put on another familiar ground: that the plaintiffs, having sued in a special character, the pleading over admitted their capacity; a doctrine very extensively applicable, and perfectly familiar to the law.

Vivian v. Shipping, Cro. Car. 384, was assumpsit on an award, and the plaintiff's right of action depended on the performance of a condition precedent. He averred performance of the award on his side generally, which was informal. The defendant pleading over, the court said it was too late for him to attack the declaration for a mere defect of form. *Slack v. Bowsal*, Cro. Jac. 668, and *Buckland v. Olley*, id. 683, both obviously went on the same ground. *Drake v. Corderoy*, Cro. Car. 288, is a stronger application of the same principle. The plaintiff declared in slander, that he was a constable and sworn before the justices of the peace of the county of Wilts, at their quarter sessions, concerning an affray by the defendant, who then and there, in said court, in presence of the justices said, "he (meaning the plaintiff) is forsworn," without mentioning the oath in particular. This was informal; but the defendant pleaded over and justified, showing the oath in open sessions, and that it was false. The court said, on error brought for the defect in the declaration, that it was, to be sure, doubtful and uncertain upon the declaration, but the plea removed the uncertainty. The declaration mentioning that the plaintiff was sworn in such close connection with the charge that he was forsworn, it is quite doubtful whether the declaration could have been assailed in any other way than by special demurrer.

Stutfield v. Somerset, Cro. Eliz. 825, was debt upon an obligation conditioned to convey land to the plaintiff's son. Plea that the defendant enfeoffed a stranger to the use of the son. Replication that he did not enfeoff, &c.; and this was held to cure the defect in the plea, which was evident-

White v. Delavan.

ly good in substance, though, in strict form, the conveyance should have been to the son directly. By the statute of uses, the title was in the son, though he might not hold the deed, which the covenant intended he should have as the proper and ready evidence of his title. The court said he was not so sure of the estate, nor, peradventure, can have any knowledge of such estate or the means to prove the uses, &c. ; yet none of these were very substantial disadvantages. The plaintiff might waive them all. The court added, that he might traverse either the uses or the feoffment, which shows the plea to have been good in substance, otherwise the issues suggested would have been immaterial.

I have thus gone through with all the cases cited by the plaintiff's counsel, and those referred to by the chief justice in *Fidler v. Delavan*, and they are all reducible to the very common notions of admitting the plaintiff's capacity by pleading over, or, by the same act, waiving all objections of form. And this I conceive to be the upshot of all the cases and *dicta* in the books of pleading, where they say that answering shall cure a defect. They cannot mean that an answer will cure a defective title ; that it will change that into a libel which is not libellous in its own nature ; that a libel upon a whole city or town may thus be made a libel upon each inhabitant, and give him an action.

The judgment must, I think, be rendered for the defendant, notwithstanding the defects in his pleas.

Howe v. Cook.

HOWE vs. COOK & MAXWELL.

Counts in *assumpsit* and *trover* cannot be joined in the same declaration.

To justify the joinder of counts, it is not enough that they all relate to the same subject matter, and that the evidence is the same to support them; the counts to stand together must be in the same form of action.

The manner in which the breach is alleged does not determine the form of action, as where, in a count on a *promise* implied on the hiring of a horse, it is alleged that the defendant, *contriving* and *intending to injure* the plaintiffs, carelessly, negligently and improperly drove, &c.; this verbiage of the count will not convert it into a count in *case*, if it be clearly founded upon a *breach of promise* as distinguished from a *breach of duty* incumbent upon a bailee.

ERROR from the Cayuga common pleas. Cook & Maxwell let a horse to hire to go on a journey, to Howe, who so improperly drove the horse that he died; whereupon an action was brought against Howe. The first and second counts of the declaration were in *assumpsit*, and the third in *trover*. The two first counts contained the usual phraseology in declarations of this kind, that the defendant, *contriving to injure* the plaintiffs, &c. so *carelessly, negligently* and *improperly* drove and used the horse that he died and was wholly lost to the plaintiffs, but were clearly founded upon the *promise* of the defendant. The defendant put in a general demurrer to the declaration. The common pleas rendered judgment in favor of the plaintiffs. The defendant sued out a writ of error.

B. Davis Noxon, for plaintiff in error, insisted that the demurrer was well taken for the *misjoinder* of counts, and that the judgment of the C. P. should therefore be reversed.

I. Williams, for the defendants in error, contended that the counts in the declaration are substantially the same, and are all founded in tort. They allege a *breach of duty*, arising out of the use of property upon hire, amounting to a tortious negligence. The plea of *not guilty* would be a good plea to the whole declaration. The two first counts, though in form *on contract*, are in substance *in case* charging the defendant with gross negligence. The counsel re-

 Howe v. Cook.

lied upon *Church v. Mumford*, 11 Johns. R. 479, and *Hallock v. Powell*, 2 Caines, 216.

By the Court, BRONSON, J. In actions against bailees, attorneys and others for negligence or misconduct in the discharge of their duty, the plaintiff may in general declare either in *case* or *assumpsit*. The *gravamen* may be alleged as consisting either in a breach of *duty* arising out of an employment for hire, or a breach of *promise* implied from the consideration of hire: and other counts may be joined belonging to that form of action which the plaintiff elects to pursue. *Govett v. Radnidge*, 3 East, 62, 70. *Church v. Mumford*, 11 Johns. R. 479. Mr. Chitty gives precedents for declaring in both forms, and advises the pleader to frame his principal count in such a manner that a count in *trover* or one in *indebitatus assumpsit* may be joined, as the circumstances of the case may require.

Although the plaintiff has two modes of framing his principal count, and the evidence to support the declaration may be the same in both cases, yet other counts can only be joined when they belong to that form of action which the pleader adopts. In actions against a carrier, the plaintiff cannot declare in *case* for a loss of the goods, and add a count in *assumpsit* for money paid, or the like; nor can he declare in *assumpsit* on the implied undertaking to carry safely, and add a count in *trover* for the conversion of the property. And so of actions against other bailees. It is not enough that the counts may all relate to the same *subject matter*: the *form of action* must be the same in all. *Brown v. Dixon*, 1 T. R. 274. 1 Chit. Pl. 196-7.

The two first counts in this declaration are plainly founded upon *contract*. They set forth a *promise* and the breach of it, as the cause of action. The pleader has followed, substantially the precedents for declaring in *assumpsit* against the hirer of a horse for riding it improperly, &c.; and where this form is adopted, the common *indebitatus assumpsit* counts may be joined. 2 Chit. Pl. 145, 148. The addition of a count in *trover* was a fatal misjoinder.

The cases relied on by the defendants in error will not aid them. In *Church v. Mumford*, 11 Johns. 479, it was held

Howe v. Cook.

that the counts, whether regarded as founded on tort or in assumpsit, *were all substantially the same*; and on that ground the demurrer for misjoinder was over-ruled. There is some difficulty in understanding the case of *Hallock v. Powell*, 2 Caines, 216; and it is not fully removed by the explanations which were attempted in *Evertson v. Miles*, 6 Johns. R. 138. It was an action on the warranty of a horse. The reporter states that the declaration contained two counts, one on the warranty, the other in assumpsit. There is nothing in this statement of the case to show a misjoinder. Both counts may have been in assumpsit; for although the ancient mode was to declare in *case* on a warranty, it had been long settled that *assumpsit* would also lie. *Stuart v. Wilkins*, Doug. 18. The reporter may have been mistaken in saying that either count was in assumpsit; for the judge who delivered the opinion of the court said, that the *gist* of the action in *both* counts was a deceit or misfeasance, in delivering the plaintiff a distempered horse. But whatever was the form of action, it is enough that the court proceeded on the ground that both counts were substantially alike. It was admitted that torts and contracts could not be joined in the same declaration; and the like rule was laid down in *Church v. Mumford*.

The manner in which the breach is alleged does not determine the form of the action. In assumpsit, it is not unusual after setting out the contract, to allege for breach that the defendant *contriving and fraudulently intending* to injure the plaintiff, did not regard his promise, but *craftily and subtly deceived* the plaintiff, &c.; and this form is often followed, not only in actions against bailees and others where case would also lie, but in cases where assumpsit is the only remedy. In declaring upon contracts, it is always a sufficient breach to show that the defendant did not perform his engagement: and if the plaintiff goes further and alleges that the defendant *fraudulently and deceitfully* violated his promise, it neither changes the form of the action, nor varies the proof to be given on the trial. Lawes' Plead. in Assump. 259. *Evertson v. Miles*, 6 Johns. R. 138.

Judgment reversed.

In the matter of Galloway.

In the matter of JOHN GALLOWAY the younger, a *non-resident debtor*

An executor or administrator who enters upon leasehold property held by the testator or intestate in his lifetime, or who receives the rents and profits thereof, is chargeable in the debt and detinet directly on the covenant of the lessee as an assignee, and in proceeding against him he need not be named as executor or administrator.

If he have no assets, or the land is in truth not worth the sum due, he may show those facts in defence; *prima facie*, however, the land is deemed worth more than the sum demanded.

Being personally liable, he may be proceeded against by attachment under the act relative to absconding, concealed and non-resident debtors.

In this case certain property was seized under an attachment issued against the property of John Galloway the younger, as a non-resident debtor; a certiorari was sued out to the officer who issued the process, and on the coming in of the return to the same the following facts appeared: On 1st February, 1824, an indenture of lease was executed by E. M. Johnson and Maria his wife to John Galloway, then of Brooklyn, demising certain premises for the term of twenty-one years, subject to an annual rent of \$50; and the tenant covenanted that he, his executors, administrators or assigns would, at his and their own proper costs and charges, pay and discharge all taxes, duties and assessments which should, during the term, be imposed upon the demised premises. The lessee died intestate, and letters of administration upon his estate were granted, in February, 1833, to John Galloway the younger, a resident of England, who, up to the 13th April, 1837, the time of the presenting of the petition for the issuing of an attachment, received the rents, issues and profits of the demised premises. An assessment was imposed upon the demised premises in the laying out, opening and continuing of a road called the Bedford road, a portion of which, amounting to the sum of \$2632, the landlord, E. M. Johnson, was obliged to pay; who thereupon instituted these proceedings against John Galloway the younger, alleging that he was indebted to him personally in

In the matter of Galloway.

the above sum. On due proof that Galloway was a *non-resident* of this state, an attachment was issued by the first judge of the county of Kings.

M. T. Reynolds, for the debtor.

J. A. Lott, for the creditor.

By the Court, COWEN, J. The only objection to the proceedings insisted on was, that this being a debt against John Galloway the younger in his *representative character*, he could not be proceeded against as an *absent debtor*.

The ground taken for the debtor is in general true, and indeed always so where the debt is due by the administrator or executor, solely in his representative character. *Matter of Hurd & Selden*, 9 Wendell, 465. But it is also perfectly well settled that where rent or money for breach of covenant falls due after the death of the testator or intestate, and the executor or administrator enters, or which is the same thing, as here charged, *receives the rents and profits*, he is chargeable in the *debet* and *detinet*, or directly on the covenant as an assignee, and need not be named as executor or administrator. In certain special cases he may, it is true, defend in part, as where he has no assets and the land is in truth worth less than the sum due. But this is strictly matter of defence. *Prima facie* the land is worth more. The authorities to these points are numerous, and are all one way; and most of them may be seen collected in 2 Williams' Ex. 1076-7, Phila. ed. of 1832, where the doctrine is fully stated.

The result is that John Galloway the younger may be pursued in the case presented here as an absent debtor, within the statute. The proceedings are affirmed, and must be remitted to the first judge of the county of Kings, to be followed up in due form of law.

Cogswell v. Cole.

COGSWELL vs. COLE & LAIN.

A justice's execution against a party, an inhabitant having a family, issued before the expiration of the time limited by statute, is good, if applied for at the time of the rendition of the judgment, although judgment was not rendered until four days after the trial, and the execution was obtained without previous notice of an intention to apply for the same.

DEMURRER to replication. This was an action of *trespass de bonis asportatis*. The defendant Cole pleaded *non cul.* and *specially*, that on the *twenty-seventh day of June* he obtained a judgment before Lain, the other defendant, who was a justice of the peace of the town of Potter, in the county of Yates, in a suit commenced by him against the plaintiff, and on the same day, and at the time of rendering the judgment, on his application and oath, an execution was issued upon the judgment, by viriue of which the property in question was taken. The plaintiff replied that the cause was tried on the *twenty-third day of June*, and submitted to the justice for determination, who took four days to render judgment; that both parties then left the office of the justice, without any application being made for an execution; that the justice rendered judgment on the *twenty-seventh day of June*, and that at the time of the rendition of the judgment, the plaintiff was a resident of and had a family within the county of Yates, and that he had not notice of the intention of Cole to apply, nor of the application for an execution. To this replication the defendant Cole demurred. The pleadings on the part of Lain were substantially the same.

H. Welles, for the defendants, insisted that the execution duly issued, if, as alleged in the pleas, the application for the same was made at the time of rendering the judgment; and that the new matter of want of notice set up in the replication, was no answer to the pleas.

J. A. Spencer, for the plaintiff, contended that the pleas conceded that without a special application for the issuing

Cogswell v. Cole.

of the execution, the process, issued as it was before the expiration of the time limited by the statute, would have been illegal. That application, he insisted, according to a just construction of the statute, must be made either whilst both parties are *present* before the justice, or *on notice*, so that the party liable to execution may give the security mentioned in the act. Such was the construction given to a similar provision of this same act, by Chief Justice Savage, in *Taylor v. Fuller*, 3 Wendell, 406; and such must be deemed to have been the intention of the legislature. Here the replication substantially avers that the application was not made whilst the parties were present, or on notice. The replication, therefore, was a good answer.

By the Court, BRONSON, J. The execution issued immediately on the rendition of the judgment, although *Cogswell* was an inhabitant of the county of Yates, and had a family. 2 R. S. 249, § 134. This was irregular, and both *Cole* and the justice are trespassers, unless the execution was applied for in the manner prescribed by the 135th section: "Application for such execution may be made either *before* or *at the time of rendering the judgment*; or, if reasonable *notice* be given to the adverse party, of the intention to apply for such execution, such application may be made at any time *after* the judgment shall have been rendered." The defendants, in their pleas, have brought themselves plainly within the language of the statute; they aver that the application was made *at the time of rendering the judgment*. To this the plaintiff replies, that the justice took four days to render judgment, (§ 124) upon which both parties left the office, and the plaintiff had no notice of the intention to apply, nor of the application for an execution. This is no answer to the pleas, for the reason that when the application is made either *before* or *at the time of rendering the judgment*, no notice to the adverse party is required by the statute.

During the four days which the justice may take for consideration, the parties are only deemed in court for the purpose of receiving judgment. 10 Wendell, 521. The plain-

Swart v. Service.

tiff was not actually present when the judgment was rendered, and consequently had no opportunity of answering the application for an execution, by giving security. (§ 136.) Had the law-makers foreseen that such a case would arise, they would probably have provided for it; but we cannot supply a *casus omissus* in the statute, without assuming powers that have been confided to another department of the government. 1 T. R. 52, per Buller, J. The replications are insufficient.

Judgment for defendants.

SWART and others vs, SERVICE.

Parol evidence is admissible at law to show that an instrument, purporting on its face to be a *deed*, is in fact a mortgage.

Such evidence may be given by a defendant in ejectment, without connecting himself with the title of the party executing the conveyance.

The *deed* being shown to be a *mortgage*, the defendant may insist upon *lapse of time* as raising the presumption of payment; such defence, however, is not necessary in such case, as showing the deed to be a *mortgage* bars a recovery.

A grantor cannot set up the defence of *adverse possession* against his grantee or those deriving title from him.

See the *dissenting opinion* of Mr. Justice BRANSON upon the principal point, that *parol evidence* is admissible at law to show a *deed* to be in fact a *mortgage*.

THIS was an action of ejectment, tried at the Saratoga circuit in May, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The plaintiffs, the children of James Swart, deceased, who was the only child and heir at law of *Derick Swart*, showed title by *lease and release*, bearing date 24th and 25th September, 1784, executed by *John Cuerton* to *Derick Swart*, conveying 68 acres of land, the premises in question: which instruments of lease and release were duly acknowledged by Cuerton on the *sixth* day of *April*, 1804. *Cuerton*, the releasor of the premises, died in possession of the premises eight or nine years before the trial, having occupied them since the date of the lease and

Swart v. Service.

release. The defendant was in possession of the premises at the commencement of the suit. He offered to prove that the *lease* and *release* was in fact given as a *mortgage* for the security of a debt due from Cuerdon to Swart, and that the debt was paid by Cuerdon to Swart many years before his death: this evidence was objected to, unless the defendant would connect himself with Cuerdon, and the objection was sustained by the circuit judge. The defendant then requested the judge to charge that the evidence established an *adverse possession* in Cuerdon. The judge refused so to charge, and directed a verdict for the plaintiffs, and the jury found accordingly. The defendant now moved for a new trial on the two grounds raised at the circuit, and on the additional ground, that from lapse of time, *payment* of the mortgage might be presumed.

M. T. Reynolds, for the defendant.

S. Stevens, for the plaintiffs, insisted that a *grantor* cannot set up *adverse possession* against his grantee; and that it is not admissible at law to give parol evidence, showing that a deed is in fact a mortgage, unless *fraud* or *mistake* be shown.

By the Court, COWEN, J. The first offer made by the defendant had no dependence on privity of title between him and Cuerdon. It was a simple offer to prove an outstanding title, by turning the conveyance by lease and release into a mortgage, and showing its extinction by payment. That would divest the title of Swart and of his grandchildren, the plaintiffs; for payment extinguishes a mortgage at law as well as in equity. *Jackson, ex dem. Rosevelt, v. Stackhouse*, 1 Cowen, 122. But independent of that, if Swart were a mere mortgagee, neither he nor those claiming under him could recover. 2 R. S. 237, § 37, 2d ed. *Jackson, ex dem. Titus, v. Myers*, 11 Wendell, 533, 538, 539. *Stewart v. Hutchins*, 13 Wendell, 485. *Morris v. Mowatt*, 2 Paige, 586.

Swart v. Service.

It has often been held in the courts of equity of this state, that a deed, though absolute on its face, may, by parol evidence, be shown to have been in fact a mortgage in the terms offered here; and the same doctrine was held by this court in *Roach v. Cosine*, 9 Wendell, 227, and *Walton v. Cronley's Adm'r*, 14 id. 63, equally applicable to a court of law, and has it seems ceased to be the subject of contest; for no objection to the doctrine is now made. For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake were shown in obtaining an absolute deed where it should have been a mortgage. In either case, the deed might be rectified in equity; and perhaps even at law, in this state, where mortgages stand much on the same footing in both courts. Short of that, the evidence is a direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law. But with us the doctrine is settled, and I am not disposed to examine its foundations, at least, without the advantage of discussion.

It is not necessary to say whether the lapse of time might be called in as presumptive proof of payment, though that, as a general doctrine, is too clear to be disputed. If the defendant, on a new trial, shall succeed in making out a mortgage, he will be entitled to such proofs of payment as the nature of his case may afford, subject to the answering proofs of the plaintiffs, provided proof of payment shall become necessary.

It will not, however be necessary that we see, to complete his defence here, whatever it may be on a bill filed to foreclose by the representatives of Derick Swart; for since the revised statutes, showing that the plaintiffs or those under whom they claim are mere mortgagees, proves as we have seen, an outstanding title.

There was no evidence of adverse possession in Cuerdon. I am of opinion that a new trial should be granted; the costs to abide the event.

The CHIEF JUSTICE concurred.

Swart v. Service.

Mr. Justice BRONSON delivered the following dissenting opinion :

Although I seldom allow myself to depart from the decisions of those who have gone before me in this court, I cannot agree with my brethren in following one or two recent cases which hold that an absolute deed can be turned into a mortgage in a court of law, by parol evidence. Where the transaction was intended as a mortgage, and through fraud or mistake the conveyance has been made absolute in its terms, a court of equity, acting upon well established principles can reform the deed. But this will only be done on a direct and appropriate proceeding for that purpose, and after such ample notice to all parties in interest, as will tend most effectually to guard against surprise, fraud and false swearing. And besides, a court of equity can and will protect third persons, who may have parted with their money on the faith of the deed. But a court of law has neither power nor process to reform a deed. If parol evidence to contradict or insert a condition in the conveyance can be received at all, it must of necessity be in a collateral proceeding; and it must be received whenever either party chooses to offer it. It can be given without notice, and without the means of guarding against the obvious danger of fraud, surprise and perjury. And beyond this: when a court of law turns an absolute deed into a mortgage, it has no power to protect a bona fide purchaser. Other mischiefs will be likely to result from admitting such evidence; but without attempting at this time to point them out, I shall content myself with dissenting from what I deem a new and very dangerous doctrine.

Hart v. Seixas.

HART and others vs. SEIXAS.

It is *not* error, though it be omitted to be stated in the record of a judgment rendered by a court of *general jurisdiction*, that the court had obtained *jurisdiction of the person* of the defendant, by alleging him to be in *custody*, &c., or that he had been *served with a declaration*, or had *appeared*, or something equivalent to such allegations.

The necessity of such averment, as suggested in *Smith v. Fowle*, 12 Wendell, 9, denied; or at all events applied by the entry of an *imprisonment* and default.

The omission in the declaration of such allegations, as in *custody*, &c., is not even cause of special demurrer.

Where the *debt* demanded is \$300, and the plaintiff takes judgment for *his said debt*, together with *damages* and *costs*, although the record shows a right to recover only \$200 *debt*, a judgment by default will not for that cause be *reversed*, it being mere matter of form, *amendable* in the court below, and which the court in error may *disregard*.

Where there is a *variance* between the *debt demanded* and the several sums alleged in the different counts to be *due*, error will not lie; nor is such variance even cause of demurrer.

A judgment will not be reversed for errors in *matters of practice*, though brought up by *certiorari*.

The question, *when jurisdiction will be presumed*, considered.

It is *not* error, though it does not appear in the record of a judgment rendered by a court of common pleas, that the defendant at the time of the commencement of the suit was *a resident of the county*.

See the *dissenting opinion* of Mr. Justice BRANSON, to the first proposition above stated.

ERROR from the New York common pleas. *Seixas* commenced a suit against *Hart*, *Bush* and *Young*. By the record returned to the writ of error it appears that the declaration commences in this form: "Benjamin M. Seixas assignee of John Hillyer, sheriff of the city and county of New York, pursuant to a statute, plaintiff in this suit, by A. D. R., his attorney, comes here into court, and by this declaration filed pursuant to statute, complains of Joseph C. Hart, George Bush and George Young defendants, residents of the said city and county of New York, of a plea," &c. The plaintiff then demands \$300 of debt, and sets forth a bond executed by the defendants in the *penal* sum of \$100, conditioned that if *Young* should appear on the

Hart v. Seixas.

return day of an attachment issued by the vice chancellor of the first circuit, and abide the order of the court, the obligation should be void. The plaintiff then avers that Young did not appear, whereby the bond became forfeited, and the vice chancellor made an order directing it to be delivered over to the plaintiff to be prosecuted; which was done accordingly. By means whereof an action accrued to the plaintiff, to demand and have the said sum of \$100; yet the defendants had not paid the said sum, &c. Then follows a *second count* upon the same bond, wherein after setting forth the bond and condition, the plaintiff avers that on, &c. the vice chancellor ordered the bond to be continued over, that Young should within 10 days pay the costs, of the attachment and answer the plaintiff's bill filed against him; that Young did not pay the costs of the attachment or answer the bill within the time limited by the order, whereby the bond became forfeited, &c. as in the *first count*. Next follows an *imparlance* in these words, "And now at this day, to wit, on, &c. until which day the said *Joseph C. Hart* and *George Bush* had leave to imparle, &c. comes the said plaintiff by his attorney aforesaid, (the said *George Young* being not found or served with a copy of the declaration filed in this cause pursuant to the statute,) and the said *Joseph C. Hart* and *George Bush* at the same time solemnly called, come not, nor do they say any thing in bar or preclusion of the action aforesaid." Then follows the award of a writ of inquiry, an inquisition assessing the plaintiff's damages at \$100, and a judgment against *all* the defendants, that the plaintiff recover *his said debt*, \$100 for his damages, and \$29 for costs and charges.

The defendants sued out a writ of error, and besides a general assignment of errors, *pecially* assigned for error, 1. That there is *no declaration* on file authorizing the entry of the judgment; 2. That the suit was originally commenced against *two* of the defendants, viz. Hart and Bush; 3. That the plaintiff illegally amended the declaration filed, by adding the name of Young; 4. That such amendment was made without any rule authorizing it; 5. That there is no affidavit on file of the personal service of the *original* or

Hart v. Seixas.

amended declarations on *Hart* and *Bush*, authorizing their appearance to be entered ; and 6. That there is no entry of their appearance. The defendants thereupon prayed a *certiorari*, requiring the common pleas to certify, &c. The writ issued, and the C. P. returned that they find no original declaration on file in which *Seixas* is plaintiff, and *Hart*, *Bush* and *Young* are defendants, but that they find that an action was commenced by *Seixas* against *Hart* and *Bush* ; that *Seixas* amended his declaration in such action by adding the name of *Young*, in pursuance of a rule to amend granted 2d July, 1835. The common pleas also returned affidavits by which it appears that a copy of the *original declaration* was served on *Hart* personally, on the 11th May, 1835, and a copy of the *amended declaration* on his clerk in his office ; also that a copy of the *original declaration* was served on *Bush* on the 9th May, 1835, (but no affidavit was returned of the service on *Bush* of the *amended* declaration.) The court further returned, that on filing the said affidavits the *appearance* of *Hart* and *Bush* was entered. To this assignment *Seixas* pleaded *in nullo est erratum*.

J. L. Wendell, for the plaintiffs in error. The judgment is erroneous ; it is not shown *by the record* that the common pleas had *jurisdiction over the persons of the defendants*. 12 *Wendell*, 11 ; and on the other hand it is shown *affirmatively* by the return to the certiorari, that the court *had not* jurisdiction. There is no *original declaration* on file against *all* the defendants ; the plaintiff had no right to amend by adding a new defendant, 8 *Cowen*, 122 ; but if he had such right, a copy of the *amended declaration* should have been served *personally* upon the defendants, which was not done upon *either* of them. The declaration also is *bad* in not assigning breaches. The first count does not pretend to assign a breach ; and the second is radically defective : it alleges the non-payment of the costs of the attachment, without stating that there were any costs to be paid, or specifying the amount. The judgment is erroneous also in amount : it is for \$300 debt, when, according to the *penalty* of the bond, it ought to have been for only \$100 debt.

A. L. Robertson, for the defendant in error.

Hart v. Seixas.

By the Court, COWEN, J. The only point now raised bearing the semblance of a substantial error is, that breaches of the bond are not assigned; and that is contrary to the fact. The condition was *that Young should appear*; and the breach assigned in both counts is, that *he did not appear*, the second count adding an order to pay costs, and the disobedience of that order. This is a full compliance with the statute requiring breaches to be assigned on bonds with a condition other than for the payment of money. 2 R. S. 300, 2d ed. § 6. The action on attachment bonds pursuant to an order of court, is by statute put on the same footing as that on a bond for performance of covenants. A general breach is sufficient, on which the damages are to be assessed by a jury according to the extent of loss or injury sustained by the plaintiff. Id. 444, § 28, 29. *Thomas v. Cameron*, 17 Wend. 59, 61.

The proceeding was under the joint debtor act, 2 R. S. 300, 2d ed. § 5, and as such is perfectly regular on the face of the record, if that is to be taken as importing a proper service of the declaration upon, or the appearance of *Hart and Bush*. It admits, in the imparlance clause, that Young was not served with process. This is a correct form with a view to save his future rights; but its omission would be mere matter of irregularity, to be corrected on motion in the court below. The record, the only thing we can notice on error, would be equally perfect with or without it. In either case judgment should be entered as it is here, against all the defendants, though its well known effect is to reach only the joint property of the defendant who shall not be brought into court.

As to the amount of the judgment. The declaration is for \$300 in debt. This is not filled up by the counts, but that is agreed to be mere matter of form, which cannot be noticed on error, and probably not even on special demurrer. Mr. Chitty says, "the debt demanded should regularly be the aggregate of all the sums alleged to be due in the different counts; but a mistake in this respect, whether more or less, will not be a cause of demurrer; nor is it necessary to prove that the debt amounted precisely to the

Hart v. Seixas.

sum stated to be due." 1 Chit. Pl. 309, of the Phil. ed. of 1828. But the judgment is, "that the plaintiff recover against the defendants his said debt aforesaid; and also \$100 for the damages which he hath sustained by reason of the detention of that debt, and also \$29 for his costs, &c." It is objected, therefore, that the judgment is for \$300 debt, whereas the penalty of the bond set forth in each of the two counts is \$100 only. By the default two such bonds are confessed; but that will carry the debt to \$200 only, yet the plaintiff takes judgment for his *said debt*. If these words mean the whole \$300, as I think they must be taken to do, the judgment is erroneous for the excess of \$100. In argument, it was said the damages were also \$100, and the whole made up the full sum demanded. The damages are no part of the debt in demand. The statute is that judgment shall be rendered for the penalty, or penal sum forfeited, as in other actions of debt; and with a farther judgment, that the plaintiff have execution to collect the amount of damages assessed. 2 R. S. 301, 2d ed. § 10. Yet the judgment is, in this respect, but matter of form; for, by the next section, execution shall, though it goes for the whole, be endorsed but for the real damages and costs; and by the next, on collecting these, the judgment shall be deemed satisfied. § 11, 12. The case is not like that of a judgment sounding in damages, which governs the execution, and so might prejudice the defendant; but it is the same thing in substance, whether it stand for the less or greater sum. The substance lies in the judgment for *damages and costs*, which shows the true sum, and overrules or supersedes the debt. Therefore it is amendable in the court below, and may be disregarded here by 2 R. S. 343, § 4, and 498, § 60, 2d ed. By this § 4, after judgment rendered, any defects or imperfections in matter of form in the record, &c. may be amended, and a variance in the record from any proceeding, is specially mentioned. This judgment for \$300 may be considered a variance or departure from what is required by the previous proceedings. Section 7 of the same statute, id. p. 344, provides for amending mistakes in stating sums of money after judgment by default, in all cases

Hart v. Seixas.

where the sum has been once rightly alleged. See sub. 10. Then § 60, at p. 498, declares that no judgment shall be reversed, &c. for any defect of form, variance or other imperfection in the record, &c. amendable in the court below, but such defects and imperfections may be supplied and amended, or be deemed so to be, by the court of error. In this case the mistake may be overlooked and suffered to stand, for it does not work any prejudice.

But the declaration omits the words "in custody, &c." or any equivalent words, which are insisted on as essential jurisdictional terms, without which the judgment below cannot be sustained. This question was very fully considered in the late case of *Fbot v. Stevens*, 17 Wendell, 483, in its bearing on a collateral action to enforce the judgment. We there agreed that the court of common pleas is one of general jurisdiction, and that the want of this allegation did not so far invalidate the record as to defeat the action; in other words, that the record was not void; and we agreed that this was so, though it no where appeared by the record that the defendants were served with a declaration, or were in custody, or had appeared. It has been often held that the omission of these facts in the declaration is no ground for demurrer, even though it be special. See several cases in a note, 12 Wendell, 12, and *Smith v. Fowle*, id. 9, 11. In the last case, the late Chief Justice Savage adds: "But the pleader should take care, however, to show in his record that the court had jurisdiction of the person of the defendant before judgment is entered against him. When the defendant appears, the fact will be apparent upon the record, and when judgment is entered by default, the record should show the jurisdiction of the court by a compliance with the directions of the statute. But the declaration cannot contain those facts. They are to follow, not precede, the filing of the declaration."

The record before us fails to show directly that the court below had acquired jurisdiction by the service of process, and supposing it to show no appearance, the question is whether a court of general jurisdiction is bound to show its regularity expressly, or whether it will be intended? The conse-

Hart v. Seixas.

quence of the omission was not adverted to in *Smith v. Fowle*. The remark of the learned chief justice was *obiter* ; and it certainly never has been holden that such an omission is error. Nor, with great deference, can it be so held, until we take it upon us to overturn the well settled doctrine of centuries. I understand the case of *Peacock v. Bell*, 1 Saund. 73, as speaking the manner in which courts are to treat records which are brought before them on writs of error. That was error from a judgment in assumpsit of the court of the county palatine of Durham, whose jurisdiction was of such promises only as were made within the limits of the county. The declaration did not aver that the goods on sale, of which the promise was made, were sold within the county. Wherefore it was alleged for error, that it did not appear but that the goods might have been sold in another place, *precisely* as it is said here, *it does not appear but that the declaration might not have been served*. It was there agreed that many judgments from *inferior courts* were daily reversed for that cause. But the judges first went on to show that in respect to the palatine court, questions of jurisdiction stood on the same footing as they would on error from a superior court. They then add and the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged, and though the court of the county palatine is inferior to this court of king's bench, yet that does not prove it to be *an inferior court*, in the sense *that it ought to certify every thing precisely* ; for the common bench is inferior to this court ; but yet it is an original and superior court, of which the law itself takes notice, and so is the court of the county palatine ; and consequently the omission in the declaration is no error, because it shall be intended that the contract was made within the jurisdiction if it does not appear to the contrary. It is said that this was a question of local jurisdiction, which I freely admit. But in that I insist it is a case of much more difficult intendment than the regular service of process. In respect to the former, so

Hart v. Seixas.

strict is the law, that on error to an inferior court, as was agreed in the case cited, it requires jurisdiction to be expressly certified in the return to a certiorari. But even the lowest court is never required to show expressly that its process has been served; not even where it proceeds in a criminal matter.

In *Rex v. Venables*, 1 Str. 630, which was a certiorari from a criminal conviction by justices, it was moved to quash it on the return, for want of showing a summons or appearance of the defendant. "*Sed per curiam*. We will not presume they acted unlawfully. A summons is certainly necessary, and the justice is punishable if he proceeds without. You never show notice to the parish that is to be charged in orders of removal." This case is also reported in 2 Ld. Raym. 1405, where the court said, it not appearing by the order that there was no summons, or that there had been an ill summons, they *would intend the justices having jurisdiction proceeded regularly*. Fortesc. 325, S. C. In *Rex v. Cleg*, 1 Str. 475, on the return of an order of bastardy, originally made at the quarter sessions, an objection was taken that it should be quashed, because it was *not said the defendant was ever summoned or appeared*. Pratt, C. J. at first hesitated, because, as he remarked, he had often heard it said that nothing shall be presumed one way or the other in an inferior jurisdiction. But Eyre J. said that in *Rex v. Peckham*, Carth. 406, the court said, "Where a summons was necessary, they would presume there was one, unless the contrary appeared, for *all jurisdictions are presumed prima facie to act according to law*." Fortescue J. said, "It is certain that natural justice requires that no man shall be condemned without notice; for which reason I think the order will be good, because it does not appear to us that he had no notice. *Are we to suppose the sessions have proceeded contrary to right and justice, and that too in a case where they have undoubted jurisdiction?*" The case was afterwards moved again, and the order confirmed without opposition. "Therefore," says Mr. Nares, "wherever a summons is necessary, the court presumes one, unless the contrary appears; for all jurisdictions are presumed to act *prima*

Hart v. Seixas.

facie according to law." Nares on Penal Conv. 10. "It is usual and proper," says Mr. Nolan, "to state that the defendant was summoned; and that he either appeared in consequence thereof, or neglected to do so. But it is not in strictness necessary that this should be averred on the face of the proceeding, as the court will intend that it was unless the contrary appear." 2 Nol. Poor L. 269. In *Rex v. Clayton*, 3 East, 61, Lord Ellenborough said, "The law has been settled by so strong a series of decisions from the time of Lord Holt down to a very recent period, that every intendment shall be made in favor of an order of justices, that we must see whether by any intendment which can be made, the present order can be supported."

Nor will the courts mouse about by certiorari, to snatch up collateral flaws in the orders of justices. In the late case of *Rex v. The Justices of the Hundred of Cashionbury*, 3 Dowl. & Ryl. 35, Brougham moved for a certiorari, to bring up a flaw which did not appear on the face of the conviction. The court said that no objection could be taken unless it appeared on the face of the conviction itself, and not upon any collateral proceeding.

In *Brown v. Wood*, 17 Mass. Rep. 68, on giving in evidence the probate of a will of lands, though the statute expressly required notice to the heir, none was mentioned, yet the court intended it. Jackson, J. observed p. 72, "upon the common presumption in favor of every judicial tribunal, acting within its jurisdiction, we must intend that all persons concerned had due notice."

In the case at bar, we are asked to withhold from the common pleas of New York, a court of general jurisdiction, that favorable intendment on a return to a writ of error, which Westminster Hall accords to the most humble and limited branches of the English police. It is not necessary to deny that we have been more exact in scanning returns from justices. If so, it is because they hold *inferior courts*, in which I admit we do require, that on judgment by default, a regular return to a regular summons should appear. But that is, because a single justice is a court of inferior jurisdiction and limited powers. Whereas, I must have been

Hart v. Seizas.

quite unfortunate in *Foot v. Stevens*, if I failed to show that we have always regarded the common pleas, in the quality of its jurisdiction over subject matter, as on a footing with this court. It proceeds according to the course of the common law, through its educated attorneys and counsellors, mostly practitioners in this court; by its jury, its sheriff, clerk, indeed the same machinery throughout. I do not understand it to be denied that the records of that court are entitled to the same favorable interpretation with our own, nor that every intendment in favor of official, moral and prudential accuracy, honesty and care, is due to them which would be applied to the courts of Westminster Hall or to this court. Why, then, are we asked to withdraw from the superior courts the maxim which we extend even to all the graver transactions of private life: *Omnia præsumuntur legitime facta, donec probetur in contrarium?* Co. Litt. 232, b. Has history shown their general corruption, and stamped them with suspicion? That is not pretended. Is there any authority in this or any other common law court against such intendment? I have found none. None was cited by counsel on the argument; none has been found by either of my learned brethren; and I am therefore bold to say that none can be found. I inquired for an authority a full term and vacation since, and all research has been vain. I have been referred to the uniform commencements of declarations, which in the king's bench are always *in custody*, &c. ; or, in the common bench, that the defendant was *attached* or *summoned to answer*, &c. But this is evidently mere matter of form. I want a case where the omission was ever holden for error, or where any English judge ever supposed it would be error. That it is commonly a part of the declaration, is no answer, any more than that pledges to prosecute are a part, the omission of which we hold is not even ground of special demurrer. I admit that the short recital at the beginning of the declaration is still kept up by the new English rules, and it is required, instead of the old form, to distinguish and show how the defendant was proceeded against, as whether by summons, arrest, service of writ, &c. 5 Bligh, 617, 618. I do not

Hart v. Seixas.

deny that this may be very well. But I do deny that the omission was ever holden for error, or that it is any thing more than a mere formal defect amendable, even if it be so much. The same rules require the plaintiff to state the form of action; but the omission has been disregarded as not even a ground of special demurrer. *Ander-son v. Thomas*, 9 Bing. 678. Mr. Chitty says, that "in general, the recital or reference to the writ in the commencement of the declaration is not considered as any part of the declaration, and consequently a mistake therein is no ground of demurrer." 1 Chit. Pl. 256, 257, Am. ed. of 1828. Mr. Boote says that the recital, as to the process, was originally an entry by the prothonotary, that it might appear that the court had cognizance of the cause. Boote, 65. He says the words *in custody*, &c. in the king's bench, are a mere idle fiction, and recommends the total omission, in all courts, of any allusion to the mode in which the court has obtained cognizance of the cause. *Id.* 72, note. *Id.* 73, 74. He expresses his surprise that the words *summoned*, &c. *and attached*, &c. should be continued, "notwithstanding the practice to which they relate has been discontinued some hundreds of years:" and adds, "What religious observers of antiquity have the practisers of the law been, in all things that were not absolutely forbidden them!" *Id.* 75.

On the whole, I think it plain from the best English writers, that they consider the omission as the merest matter of form. I admit there is no case directly denying that it is error; which I cannot doubt is owing to the fact that no one ever thought of its being so, until modern subtleties came to be raised on the new mode of declaring under the revised statutes. It is perhaps to be regretted that the ordinary introductory words of a declaration had not been kept up as was the case in the action of ejectment before the statute. If the defendant was not properly served, he moved to set aside the proceeding for irregularity. Such is his true course in regard to all suits by declaration. The recital of service, or that he is in custody, does not conclude him. It is *ex parte*, and so of any entry which the plaintiff

Hart v. Seixas.

makes upon the record, as that he has been served or has appeared.

But the direct and strong authorities are, that on certiorari to the inferior magistrates, due service of the proper process shall be intended. *A fortiori* of the process of the higher courts, which is various in its forms, and less open to abuse. Why did the defendants below lie by and bring error? If they had not been regularly served, did they doubt the common pleas would set aside the proceedings? When was a writ of error ever sustained for a mere collateral irregularity, the subject of a summary application?

With regard to the errors assigned in respect to amendments, affidavits, rules, &c., we shall see presently, upon authority, that they are not noticeable on writ of error. To my mind they are material only as showing that the proceeding before us is the more unreasonable, because, from the certiorari which the plaintiffs in error have themselves caused to be returned, it appears that they had actual notice by a personal service of a declaration as early as in the month of May, 1835. The declaration served on them was against all three of the defendants, obligors in the bond, though the one on file was against two only. But that was afterwards amended by adding the third, who could never be found. There was no affidavit that the amended declaration was served personally; but there was enough in the original service to give the defendants all reasonable notice that they were pursued. Their appearance was entered by the clerk; and judgment by default taken against them. They must have had notice of all this years ago; and it is too late now to move the court below to set aside the proceedings. It is certainly a new method of practice, to let time go by in the court below, and then move here upon a writ of error. The amendment having been made in the court below, we must take every thing to be right in point of form; that the original declaration had been so, as well as the one on file as that which was served. Amendments and matters of practice there are things of discretion; and it has been often held that they cannot be noticed here, though brought up by certiorari. It will be sufficient

Hart v. Seixas.

to cite the last case decided on the subject. It is a full answer to all the errors insisted on as existing in the out-works of this record. The case I mean is *Mellish v. Richardson*, reported in several books, but most generally circulated among the profession in 9 Bing. 125. Error was there brought to reverse an amendment; and all the judges of England agreed that it would not lie, although the order for amendment was sent up as a part of the record. They laid down the following rules: That the proper object of a writ of error is to remove the final judgment with its premises, which are "the pleadings between the parties; the proper continuance of the suit and process, the finding of the jury upon an issue in fact, if any such has been joined; and lastly the judgment of the inferior court." These, it was said, the parties below have a right *ex debito justitiæ* to have upon the record. The judges add, "The practice of the courts below is a matter which belongs by law to the exclusive jurisdiction of the court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to, or revision by a superior court; and we cannot but observe, that no precedent has been cited at the bar, in which an entry similar to that contended for by the plaintiff in error is to be found. The court therefore, refused to notice the ground or order for the amendment, although both were returned. This case shows that we have nothing to do with the declaration original or amended, the rules, affidavits, mode of service, &c., returned here. The party can not pass by such matters of regularity in the court below and bring error. The rules of judging on summary application and on error are different; and the subjects of the two should therefore be kept distinct. With regard to practice, any slip made by the party must be moved against the very first opportunity; and by statute no judgment of a court of record can be set aside for irregularity on motion after one year, 2 R. S. 2d ed. 282, § 2; whereas writs of error are limited to two years. *Id.* 493, § 21. The irregularity, says *Eunomus*, that pushes a cause

Hart v. Seixas.

out of its course must be redressed by the interposition of the court. Dialogue 2, § 25.

Having considered *Mellish v. Richardson*, in its application to those several matters of practice which the plaintiff has endeavored to pick up and bring before us by a *certiorari*, I think the case may also be made to bear on the question whether the omission to show by the record a service of the declaration is error. In stating what is the substance of error, the judges enumerate the *pleadings, continuances, verdict and judgment*. They take no notice of any memorandum upon the record, as to the mode in which the defendant may have been served with process, or the fact of appearance. It evidently never entered their minds that omitting to mention either would be ground of error. Such a memorandum we have seen by authorities both in England and in this court, make no part of the declaration or pleadings.

But admitting that we are to reverse the rule of intentment, is the objection well founded in point of fact? Although it does not appear directly on this record *that the defendants were served*, I think it is virtually declared *that they appeared in the cause*. It states an imparlance of Hart and Bush, from April to September term. The words are, "to which day the said *J. C. Hart* and *Geo. Bush* had leave to imparle to the declaration aforesaid, and then to answer, &c.;" but they being solemnly called at that day, came not. Now an imparlance is by the court giving them leave, on petition, to answer at another time, or giving time to plead. Toml. Dict. Imparlance. It is not easily conceived how there could be an imparlance and then a default, without an appearance. In *Rex v. Simpson*, 1 Str. 44, which was a conviction for deer stealing, an objection was taken that the summons set forth in the conviction did not specify the place and hour. It was only *that he was summoned at that time and place; but made default*. The court said: "the default entered by the justices implies the summons was *to appear* at that time and place; for *otherwise it would not be a default*." The case at bar is stronger. There is entered on the record here both *an imparlance and*

Hart v. Seixas.

default, neither of which could possibly have been without an appearance of, or a notice to the defendants below, who are here complaining that they had no chance to be heard. For one, I cannot consent to withhold from this record at least the very fullest measure of favorable intendment which Westminster Hall accords to common magistrates on a record of deer stealing. If appearance or service be implied by the imparlance and default, then the rule laid down in *Smith v. Fwble* is satisfied in its severest application.

I had occasion to observe also in *Foot v. Stevens*, that if the record was there to stand impeached for defect of form in not showing service of appearance, I thought we ought to allow the cause to stand over until the court below could be moved to amend. I thought then, and I am clear still, that the case is a proper one for amendment, within the 2 R. S. 343, 2d ed. § 4. See 17 Wendell, 487, 488. It is remarkable that while we were holding that cause under advisement, the common pleas, as I was afterwards informed by my brother Bronson, on what he had heard, actually did amend the record, by an express and direct entry. They did this, doubtless, because it was according to the truth, as we cannot but see it would be in the case now at bar. But we have also seen that, in a proper case, we can ourselves either amend or overlook defects where they are prejudicial to nobody. 2 R. S. 498, 2d ed. § 60. I feel entirely convinced from the showing of the plaintiffs in error themselves, that there is no foundation for their objection. They had regular notice on an informal declaration, it is true; but it could not substantially prejudice them, that Judge Irving afterwards allowed the declaration to be amended. If, therefore, the defect could, in general, be at all regarded on error, I think, under the circumstances here, we ought to overlook it.

In any view, which I have been able to take of this case, I see no error; and am of opinion that the judgment should be affirmed.

Mr. Justice BRONSON delivered the following dissenting opinion :

Hart v. Seixas.

This was a judgment by default, and it does not appear from the record that the court below obtained jurisdiction over the persons of the defendants. It is not averred that the defendants were in custody, or that they had been served with process, or a copy of the declaration. There is nothing in the record from which we can say that either of the defendants had the opportunity of being heard before the judgment was rendered. If a copy of the declaration was served, that fact should appear by the record to give the court jurisdiction. *Smith v. Fowle*, 12 Wendell, 9.

In *Denning v. Corwin*, 11 Wendell, 647, a judgment of this court in partition was given in evidence, and because it did not appear from the record that the court had acquired jurisdiction in relation to unknown owners in the manner prescribed by law, the judgment was held a nullity; it was not only merely erroneous, so that error would lie; but was absolutely void, so that the objection might be taken in a collateral action or proceeding. On a review of the same question in *Foot v. Stevens*, 17 Wend. 483, we held that the judgment was voidable only, not absolutely void; and that the defendant could not avail himself of the objection in an action on the judgment. His remedy was by motion in the court where the judgment was rendered, to set it aside, or by writ of error. This distinction was taken in *Kempe's lessee v. Kennedy*, 5 Cranch, 173, 185, where the objection was, that the court of common pleas, in which the judgment was rendered, had no jurisdiction over the person of the defendant. Marshall, Ch. J. said, the judgment was not an absolute nullity, which might be totally disregarded; but it was erroneous, and might certainly be reversed. On this distinction I assented to the decision in *Foot v. Stevens*, although it partially overruled the case of *Denning v. Corwin*. We are now asked to go further, and say that there is no error, although the record fails to show any jurisdiction over the person of the defendant. To this doctrine I cannot assent.

The case of *Peacock v. Bell*, 1 Saund. 73, is relied on as authority in support of this judgment. It was a writ of error to the court of the county palatine of Durham. The plaintiffs in the court below declared that the defendant on, &c.

Hart v. Seixas.

at the city of *Durham*, was indebted to the plaintiffs in £39, for divers merchandizes and wares by the plaintiffs to the defendant before that time sold and delivered; and being so indebted he promised to pay. The defendant appeared and pleaded to the action, and after a verdict and judgment for the plaintiffs, it was objected for error, that although the promise was made at *Durham*, yet the wares might have been sold and delivered at another place, out of the jurisdiction of the court. The plaintiff in error sought to apply the rule in relation to *inferior* courts of limited territorial power, that the *consideration* of the promise, as well as the *promise* itself, must be laid in the declaration within the jurisdiction of the court. Note 3 to this case. *Saunders*, of counsel for the defendants, said the court of the county palatine was among the number of *superior* courts, and that "the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." A majority of the judges finally declared themselves of this opinion, and, although *Kelynge*, Ch. J. dissented, the judgment was affirmed. This was not a question of jurisdiction over the person of the defendant, but in relation to the subject matter of the action. The defendant had appeared in the court below and pleaded; and in such a case it was but a reasonable intendment, nothing appearing to the contrary, that the cause of action arose wholly within the jurisdiction of the court. But I find no case which sanctions any intendment in favor of jurisdiction *over the person* of the defendant; and I am unwilling to indulge any presumption against a party, who, so far as appears, has never been summoned or had the opportunity of being heard. When it appears that a court of general powers has acquired the right to act in relation to the parties, presumptions may be liberally indulged in support of its proceedings; but we cannot presume jurisdiction over the person of the defendant without the danger of subverting one of the first principles of justice.

 Bank of Buffalo v. Boughton.

The case of *Buchanan v. Bucker*, 9 East, 192, is an authority for holding this judgment not only erroneous, but absolutely void; and *Kempe's lessee v. Kennedy*, 5 Cranch, 173, 185, is an authority for saying it should be reversed. If there be any authority in favor of affirming the judgment, I have not met with it; and such a course is contrary to all my notions of the right administration of justice.

Judgment affirmed.*

 BANK OF BUFFALO vs. BOUGHTON, impleaded, &c.

A bond executed by an officer to be relieved from arrest on an attachment issued against him for not returning an execution, where the penalty exceeds one hundred dollars, is void, if the attachment was issued without an order fixing the amount in which the party proceeded against should be held to bail.

It seems that in a declaration on such bond, it should be averred that the bond was ordered by the court to be delivered to the plaintiffs to be prosecuted; and that an averment that it was ordered to be delivered up to be prosecuted, without naming the plaintiffs or authorizing them to prosecute, would not be held sufficient on demurrer.

DEMURRER to declaration. The plaintiffs declared on a bond in the penal sum of \$4000, executed to Tamerlane T. Roberts, Sheriff of the county of Niagara, conditioned that George Reynale should appear at the return of an attachment issued against him, for not returning an execution which had been delivered to him as late sheriff of Niagara to be executed, and abide such order as should be made in the premises. The plaintiffs averred that Reynale did not appear as required by the condition of the bond, that the bond

* During this term the case of *Kelly and others v. Kelly & Donnelly* was also affirmed on a writ of error to the New York common pleas. The error relied on was that it did not appear by any allegation in the record that the defendants below were residents of the county of New York. Judge BRONSON was of opinion that the error was fatal, and that the judgment ought to be reversed, but the CHIEF JUSTICE and Judge COWEN were of a different opinion, and for the reasons assigned above, affirmed the judgment.

Bank of Buffalo v. Boughton.

thereby became forfeited and that this court *ordered it to be delivered up to be prosecuted*, and that by virtue of such order, the bond, according to the form of the statute in such cases made and provided, *became* and was duly *assigned* to the plaintiffs. By means whereof an action accrued, &c. In the introductory part of the declaration, the plaintiffs stated that the rule for the attachment, was *entered in the common rule book* at the clerk's office at Geneva. The defendant *demurred* to the declaration.

S. Stevens, for the defendant.

A. Taber, for the plaintiff.

By the Court, COWEN, J. This attachment appears on the face of the declaration to have been issued *on a rule of course*, and without any special application to the court, and without any order fixing the amount in which the late sheriff was to be holden to bail, pursuant to 2 R. S. 442, § 6, 11, 2d ed. 'The 11th section expressly requires that when such an attachment issues, the party entitled to the writ shall procure an order from a judge or commissioner, directing the penalty of the bond; or, by section 15, id. p. 443, the defendant shall be discharged from arrest, on executing a bond in the penalty of \$100. A previous statute in the same volume, p. 214, § 60, 2d ed. declares that no "sheriff, or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner, than such as are provided by law; and any such bond, obligation or security taken, otherwise than as herein directed, shall be void." The bond declared on, appears to have been taken by color of the sheriff's office, in a case other than such as is provided by law for so large a bond. It could not legally have been for more than 100 dollars. The declaration is therefore defective on general demurrer. *Love v. Palmer*, 7 Johns. R. 159. *Strong v. Tomkins*, 8 id. 98.

It is not necessary to consider the objection of the omission to show that any order was made to deliver this bond *to the plaintiffs*, to be prosecuted; though it is quite doubtful whether this be not also a defect in substance. The

Connolly v. Smith.

statute, 2 R. S. 444, § 27, declares that if the defendant does not appear at the return day, the court may order the bond to be prosecuted. Section 28 says, "such order shall operate as an assignment of the bond to *any aggrieved party* who shall be *authorized by the court* to prosecute, &c." This declaration does not state that the plaintiffs were either *named* in the rule, or in any way *authorized by the court* to prosecute. The rule comes in the place of a formal assignment, which must always name the assignee, or designate him in some way. The formal conclusion, whereby the bond became and was assigned to the plaintiffs, can not be received for any thing. The statute gives an effect to the rule which was unknown to the common law; and a strict compliance with its provisions should be shown. Clearly the declaration would be bad for not doing so upon a special demurrer, and I incline to think a general demurrer; for it does not show enough from which we are driven necessarily to infer, even by way of argument, that this court authorized the *plaintiffs* to sue. The rule might have been in favor of their assignees. I am of the opinion that the defendant is entitled to judgment.

The CHIEF JUSTICE and Mr. JUSTICE BRONSON concurred on the first ground taken by Mr. Justice Cowen, viz. that there was no right to take the bond.

Judgment for defendant.

CONNOLLY and others vs. SMITH.

An *alien widow* is not entitled to dower, although at the time of her marriage her husband was *also an alien* and held land under the act of 1825 enabling aliens to purchase and hold real estate. Her husband had the capacity to purchase and hold real estate; but she not having such capacity, cannot claim dower in the lands of her husband.

ERROR from the New York common pleas. This was an action of ejectment brought by Catharine Smith, to recover the *dower* assigned to her in the estate of her husband,

Connolly v. Smith.

Patrick Smith, deceased. Patrick Smith being an *alien*, came to reside in this state in 1822. On the 1st August, 1823, he took the incipient steps to become naturalized, by duly declaring his intention to become a citizen. On 28th January, 1828, he filed in the office of the secretary of state a deposition and certificate, as required by the act of the legislature of this state passed in 1825, relative to the purchase and holding of real estate by *aliens*; and on the 1st February, 1828, the premises in which dower was claimed were conveyed to him. On the 10th April, 1828, he *married* the plaintiff, who at the time of the marriage was an *alien*, and had not then and has not at any time since taken any measures under any of the enabling statutes to enable her to purchase or hold real estate. She came to reside in this state in 1822. On the 10th March, 1829, Patrick Smith completed his naturalization, and in 1834 he died. The evidence being closed, the counsel for the defendants insisted that the plaintiff ought not to recover, because she was not entitled to be endowed by reason of her *alienage*. The presiding judge, however, decided that she was entitled to her dower under the act of 21st April, 1825, notwithstanding her alienage. The plaintiff had a verdict, on which judgment being entered, the defendants sued out a writ of error.

C. W. Sandford, for the plaintiffs in error.

J. L. Wendell, for the defendant.

By the Court, COWEN J. The ground taken in favor of a reversal is, that the *alien widow of a citizen*, (she not being a resident till 1822,) is not entitled to dower. And this I understand to have been distinctly held in *Mick v. Mick*, 10 Wendell, 379. The widow, in that case, having been married and emigrating after 1808, the late chief justice, who delivered the opinion of the court, said she had no capacity to take *either way*—that is, as *dowager* or as *devisee*; and she therefore lost the whole land. He said that the legislature, in all their liberality to resident aliens have

Connolly v. Smith.

never made any provision for the *alien widow of a natural born citizen* ; and it is not now denied that the alien widow of a *naturalized citizen* must stand on the same footing. ¹¹

The acts within which the widow took in *Sutliff v. Forgey*, 1 Cowen, 89, 5 id. 715, S. C. on error, were expressly confined to such aliens only as came here to reside previous to the close of the legislative session of 1808. 3 R. S. 226, 228, 2d ed. They might *purchase* lands not exceeding in quantity 1000 acres. This was the only restriction ; and the recital indicating a strong disposition in the legislature to give them general countenance, and especially by means of a power to make purchases, this court, and afterwards the court of errors, in *Sutliff v. Forgey*, extended the acts to the alien widow, who became a settler and married a man capable of holding. They held that she took as *purchaser*, not within the *words* but the *equity* of those acts. In short, they placed this acquisition by marriage on the same footing as if the contingent interest of the wife had been *conveyed to her by deed*, instead of taking effect by operation of law. The view is confirmed by *Mick v. Mick*, and the later case of *Priest v. Cummings*, 16 Wendell, 615. Had the plaintiff below, therefore, emigrated before 1808, and been married before 1825, she would have been entitled as a *purchaser*. But we are without further legislation on the subject till the act of April 21, 1825, p. 427, which provides expressly that *no alien shall be capable of taking or holding lands or real estate*, unless he shall have made and filed with the secretary of state a deposition, showing that he has taken the incipient steps to be naturalized, pursuant to the laws of the United States, &c. In this he must, among other things, depose that it his intention to continue his residence and become a naturalized citizen. Pending this act, the provisions of which were substantially re-enacted in 1830, 1 R. S. 715, 716, 2d ed. the plaintiff below intermarried with Patrick Smith, who had filed the proper deposition ; and it is not denied that he was capable of taking. In 1829 he was naturalized, and died after the passage of the revised statutes, the plaintiff below still being an alien, and not having taken any steps for procuring her own nat-

Connolly v. Smith.

uralization. Section 17 of the revised statutes, 1 R. S. 716 2d ed., provides that any "alien shall not be capable of taking or holding any lands or real estate which may have descended or been devised or conveyed to him previously to his having become such resident and made such deposition," &c. And the only direct provision giving dower to an alien widow is contained in id. 733, § 2, which is merely that "the widow of any *alien* who, at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of this state at the time of such death, shall be entitled to dower of such estate, in the same manner as if such alien had been a native citizen." Now the plaintiff below was not entitled under this act, because she was not the widow of an *alien*, but of a *naturalized citizen*. By the act of 1825, during the existence of which she intermarried, she was expressly cut off from taking or holding. By the revised statutes, § 17, she was also cut off. She must take as *purchaser* or not at all, and that she cannot do for want of the deposition. Thus both points made in her behalf fail. She never acquired any contingent right as the alien widow of an alien purchaser, for under the act of 1825 she had no capacity to take or hold any right. I agree with her counsel, that had she come here before 1808, and intermarried while the acts of 1802 and 1808 were in force, there would be great difficulty in saying that the act of the husband in afterwards becoming naturalized, even under a statute like that of 1825, it being passed subsequent to the marriage, should *divest* her right. But this point assumes what never existed, in two particulars: 1. she was not here previous to 1808, and 2. if she had been, the acts under which she could once have taken and holden real estate, were previous to her intermarriage, repealed by the act of 1825, or rather it demanded a farther condition, never complied with by her, in order to confer a capacity. The course of legislation has been such, that while it has conferred a right of dower on the resident *alien widow* of an *alien purchaser*, it has denied the same right to the *alien widow* of either a *natural born* or *naturalized citizen*, unless she file the proper deposition.

 Edwards v. Russell.

We do not deny her right because her husband was incapable of taking ; but the wife must acquire a capacity of her own. It never has been supposed since *Sutliff v. Forgey*, that her capacity followed that of her husband. Such a consequence was expressly denied in that case by all the judges. We adopt the remark of Savage, C. J., in *Mick v. Mick*, "No deposition having been filed, she had no capacity to take in either way ; i. e. as *dowager*, or as *devisee*."

The result is that the judgment of the court below must be reversed, and a venire *de novo* must issue ; the costs to abide the event.*

 EDWARDS vs. RUSSELL.

Where a justice of the peace has inadvertently issued process, or proceeded in the prosecution of a suit in which he is related to one of the parties by consanguinity or affinity, it is his duty on his attention being called to the fact to suspend all further proceedings ; he cannot on that ground render judgment of *non-suit*, if the plaintiff be his relative, and if he does render such judgment, it will be reversed.

ERROR from the Broome common pleas. Russell commenced a suit by *summons* against B. & C. Edwards in a justice's court. After issue joined and the return of a *venire* sued out at the request of the defendants, the defendants moved for a *nonsuit*, on the ground that the plaintiff and the justice were *cousins*, offering to prove the fact should it be denied. The justice returned that he answered that such was the general understanding, and that after some arguments on both sides he rendered judgment against the plaintiff for two dollars and forty cents costs of suit. The plaintiff sued out a *certiorari* removing the proceedings into the Broome common pleas, which court reversed the justice's judgment. The defendant sued out a writ of error.

* See *Priest v. Cummings*, 20 Wendell, 338, in the court for the correction of errors, where the rights of *alien widows* under the enabling statutes in respect to aliens purchasing and holding real estate are fully considered.

Edwards v. Russell.

L. Badger, for plaintiffs in error.

F. G. Wheeler, for defendant in error, insisted that the justice having no jurisdiction, his judgment was void, and the C. P. decided correctly in *reversing* it.

By the Court, COWEN, J. It is declared by statute that "no judge of any court *can sit* as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." 2 R. S. 204, § 2, 2d ed. It is not denied that this applies to a justice. But it is said, first, that no proof of relationship was given, and the justice could not take judicial notice of it. Enough is collectable from the return, to warrant us in saying that it was admitted. I think, however, he may withdraw himself on his mere suggestion, and such is the uniform course with other judges. In the case of a justice, as long ago as August, 1821, this court acted on his admission that he was the son-in-law of the plaintiff, as an auxiliary ground for reversing his judgment; *Bellows v. Pearson*, 19 Johns. R. 172. The statute is directory; and doubtless had reference to the practice. The process sometimes goes on in the court of a judge to whom the party is related, where there are other judges having power; but where there are none other, as in case of a justice, he can not issue process. Such an act would be nugatory and void, for he can not sit even to receive the return. The objection meets him at the threshold; and if he issue process inadvertently, he ought simply to withdraw himself from the cause. *He cannot sit*, says the statute. The meaning is, not merely that the interests of the parties are unsafe, but the general interest of justice. Decency forbids that he should be seen acting either for or against his father, brother or cousin, &c.

It is said very plausibly that the party sued and who is not connected, ought not to be deprived of his costs; and therefore the judgment of non-suit should have been allowed to stand. That would be true, if his interest alone had been regarded by the statute. But I can not bring myself to

 Farrington v. Baley.

think that its reasons were so narrow. The same thing might be said of a suit commenced before a tavern keeper, having no jurisdiction until it is seen that he is forbidden to act upon grounds of public policy. Any *judgment* rendered by him is, therefore void. *Low v. Rice*, 8 Johns. Rep. 409. *Clayton v. Per Dun*, 13 id. 218. So here, I think the judgment was properly reversed by the C. P., whose judgment is, therefore, affirmed:

 FARRINGTON vs. BALEY.

To maintain an action against an officer, for refusing under an execution to levy and pay over rent claimed by a landlord, an affidavit of the truth of the claim must be produced to the officer; its non-production cannot be excused, although waived by the officer at the time of the claim, unless the tenant consent to a sale to satisfy the claim of the landlord.

In such action, evidence is admissible to show that *no agreement for the payment of rent* existed between the landlord and tenant. The mere occupation of premises, without an agreement to pay a liquidated sum as rent, does not give the landlord the right to require an officer to levy and pay over whatever sum he chooses to demand.

ERROR from the Tompkins common pleas. Farrington was sued by Baley in a justice's court, for not paying over to Baley the *amount of rent* claimed by him, to be due from a defendant in an execution, whose property was sold by Farrington as a constable. Baley obtained a judgment before the justice, and Farrington appealed to the Tompkins common pleas. On the trial in that court, it was proved that Baley gave notice of his claim for rent, but did not accompany it with an affidavit of the truth of the claim. There was evidence tending to show that the production of the affidavit was waived in a conversation between the plaintiff and the defendant. The defendant moved for a nonsuit, insisting that the non-production of the affidavit could not be waived by *parol*. The court refused to nonsuit the plaintiff. The defendant then proved that the demised premises formerly belonged to the defendant in the execution, and offered to prove that the sale of the premises to the plaintiff,

Farrington v. Baley.

was without consideration and fraudulent ; and further, that there never was any agreement between the plaintiff and the defendant in the execution, for the payment of the rent claimed by the plaintiff: the evidence thus offered to be given was objected to by the plaintiff, and rejected by the court. In a previous stage of the trial, the defendant in the execution was called as a witness for the plaintiff, and testified that he was a tenant of the plaintiff, and owed him rent, but could not state the amount. The jury under the charge of the court, found a verdict for the plaintiff, on which judgment was entered. The defendant having taken exceptions to the decisions of the court, sued out a writ of error.

H. D. Barto, for the plaintiff in error.

G. G. Freer & S. Love, for the defendant in error.

By the Court, COWEN, J. There was clearly no room for the defendant to show a fraud in the sale of the demised premises. Had he offered to prove that the sale and demise were with a view to defraud creditors, that would have been proper ; but for aught that appears, the fraud might have been a matter entirely between the parties to the deed.

The statute requires that an affidavit of the rent due should be furnished to the officer, who is then authorized to raise both the rent and judgment. He is let in as a kind of bailiff to the landlord, and may act very much as he could do under a distress warrant. Here was an objection that he and the plaintiff could not waive the affidavit by parol, assuming that they might waive it in some way. But I very much doubt that, unless the tenant be a party, and give his consent also, that there should be a sale ; otherwise he might sue the officer for acting against him without authority. I think the plaintiff must at all events furnish the officer with his affidavit in these cases, or he has no right to complain that the officer will not apply the proceeds to the payment of rent. To be sure, if the *tenant* expressly and freely consent, he cannot sue the officer ; but nothing of that

 Williams v. Newcomb.

kind is pretended. A summary power is given by statute, and must be strictly followed.

Again ; why was the defendant below shut out from proving that no rent was due ? for that was the amount of what he offered. The tenant, himself a witness for the plaintiff, could not state the amount of the rent, as I understand the return. That, of itself, would have been a fatal objection, if it had been taken. A tenant silently occupying under circumstances entitling his landlord to an action for use and occupation merely, does not give him a right either to distrain or demand that an officer shall levy for what he chooses to say the premises are worth. But if an agreement to pay a liquidated sum (and if liquidated there must have been an agreement) had been proved many times over, this would not preclude the defendant from rebutting and overcoming it by counter proof. That right was denied.

The judgment must be reversed, and a *venire de novo* issue from the court below, the costs to abide the event.

 WILLIAMS vs. NEWCOMB, survivor, &c.

Where a cause which has been removed into this court by *writ of error*, is brought on to argument or submitted, the plaintiff must make up and produce *error books*, or the writ of error will be *dismissed* ; it is not enough that a copy of the *judgment roll* in the court below and a *bill of exceptions* be presented.

THE parties submitted for adjudication copies of a *judgment roll* in a court of common pleas, a *bill of exceptions* taken on the trial of the cause, and written briefs. On looking into the papers and discovering that *error books* had not been delivered, the court for that cause alone *dismissed* the writ of error ; refusing to render judgment in the case.

Writ of error dismissed.

Brackett v. Watkins.

BRACKETT vs. WATKINS.

In an action by a party who claims property as *exempt from execution* under the statute, the question whether he has or has not purposely reduced his *visible property* to such an amount as to claim the benefit of an exemption, with the intent to defraud his creditors, may properly be submitted to a jury; but a court upon evidence tending to such a conclusion ought not to nonsuit the plaintiff.

The yarn possessed by a *householder* is exempt from execution to a certain amount, although he did not own the sheep upon which grew the wool used in the manufacture of the article.

ERROR from the Onondaga common pleas. Brackett sued Watkins in an action of *replevin*, for taking 30 runs of woollen yarn. The plaintiff proved that he was a *householder*, and that in March, 1837, the yarn was taken from his possession by virtue of an execution in favor of the defendant, and by his direction. In March, 1836, the plaintiff purchased 300 sheep, which he sheared, and sold the whole of the wool except one large fleece of about 4 pounds. In the summer or autumn of the same year he sold the sheep he purchased in March. On this evidence the plaintiff rested. The defendant moved for a nonsuit, on the following grounds: 1. That it was not shown that the yarn in question was made from wool sheared from the plaintiff's own sheep; 2. That there was no evidence that the plaintiff did not own a large flock of sheep through 1836 and 1837; and 3. That the statute does not apply to a case where a man has a large flock of sheep and sells all the wool except ten fleeces. The court granted the nonsuit. The plaintiff excepted and brought error.

S. Stevens, for the plaintiff in error.

B. Davis Noxon, for the defendant in error.

By the Court, COWEN, J. The first of the grounds taken by the defendant's counsel in the court below is now given up as erroneous, on the authority of *Hall v. Penney*, 11

Bracket v. Watkins.

Wendell, 44. By this case the words of the statute were equitably extended beyond their literal import, and made to cover cloth, yarn, &c. whether it comes from the sheep of the owner or not.

Nor can I perceive any force in the other points, 'when taken in the abstract. It was pretty evident that the plaintiff had reduced himself to the 30 ruus, and had no more. Being a householder, the statute conferred upon this the same protection, whether the plaintiff had before owned but 10 or 1000 sheep. I say in the abstract. Very likely the court below were disgusted with the strong appearance of a fraud upon the statute, by a man disposing of, or covering up all his other property, and turning what was intended as a shield of poverty into an instrument of fraud. It is quite common for dishonest men to do so. But I think the court below have mistaken the remedy. If there be an appearance from circumstances that the plaintiff has reduced himself to exempt property, in order to defraud his creditors, that question should be submitted to the jury, under proper directions from the court. Their sagacity would be, in general, quite a match for the case. On their being satisfied that the plaintiff had placed himself on his exempt property in order to defraud his creditors, as in the instance below, by a sale of his sheep and wool, they may clearly place him beyond the reach of the statute, by sustaining the levy. His sales or other arrangements would come within the words of the statute, 13 Elizabeth, being to delay, hinder or defraud creditors; or, if not, they would be void at the common law. The rule, then, is this: *prima facie* the fleeces, yarn, cloth, and other things limited to a certain amount by the statute, 2 R. S. 290, § 22, are protected. But if the jury believe that it was brought down to the compass of exemption, with intent to defraud creditors, they ought to find for the creditor. Most commonly, the other goods being mortgaged or sold, remain still in the debtor's possession, when either they may be seized, or those which are apparently exempt, at the election of the creditor. In general, the mortgaged or sold goods are seized. But the more artful debtor will fix a more secure cover for his property, by

 Cornelius v. Van Slyck.

changing it into money, or something as little tangible to an execution as may be, when the property claimed as exempt must be resorted to, and the question of fraud litigated upon that. On such obvious fraud as possession after a mortgage or sale, the court may doubtless nonsuit, or direct the jury to find the covin, since the statute has declared the possession to be conclusive evidence where it is not satisfactorily explained. Not so of more equivocal instances. On these the question is, in general, for the jury. We think it should have been put to them in the case before us.

The judgment must therefore, be reversed, and a *venire de novo* go from the court below, the costs to abide the event.

 CORNELIUS vs. VAN SLYCK.

An action of *slander* lies where the words are, *you will steal*, and it is averred in the declaration that the defendant by the speaking of the words meant and intended to have it understood and believed, that the defendant had been guilty of larceny.

Such an averment in the declaration following immediately after the setting forth of the words spoken, was in this case held sufficient.

DEMURRER to declaration. The plaintiff declared in *slander*, for that the defendant in a discourse had with the plaintiff in the presence and hearing of divers citizens, uttered these words, "You will steal and I can prove it," adding, "thereby, meaning and intending to have it understood and believed by those citizens last aforesaid, that the said plaintiff had been guilty of stealing, or larceny." There was a *second count* charging the words to have been spoken of and concerning the plaintiff in the third person, "he will steal," &c. with a like averment, as in the first count. The defendant demurred for that the words did not impute a crime, that they imputed only a *disposition to steal*, and therefore were not actionable.

S. Stevens, for the defendant. An action does not lie for words charging an *intent* to commit a crime, unless the in-

 Cornelius v. Van Slyck.

tent be made punishable by statute. If the words were spoken under circumstances, which would authorize a jury to find that the object of the defendant was to impute a crime, the circumstances should have been stated, and the plaintiff ought specially to have averred that such was the object of the speaker, as was held in *Andrews v. Woodmanse*, 15 Wendell, 233. Here is a mere *innuendo*, and that is not sufficient. 5 Johns. R. 211. 16 Wendell, 9.

D. Wright & M. T. Reynolds, for the plaintiff.

By the Court, COWEN, J. Taking all the words together, *you or he* "will steal, and I can prove it," we think they may very well be taken to import a charge that the plaintiff had stolen, and may therefore be laid with an *innuendo* to that effect. How could the defendant prove that the plaintiff would steal, without showing an act of larceny, and seeking to infer the propensity from that? Other modes of proof might perhaps be conceived of; but not very easily. It must require an effort of the mind, which few by-standers would exert. One inquiring the character of another, and receiving for answer "he will steal," would, it seems to me, of itself and without any thing more, be at once understood by the inquirer as equivalent to saying he had stolen. Words should be taken in the sense in which they would probably be understood by the hearers. Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable; yet a party can not protect himself from an action by the mere grammatical structure of his phrase. *Goodrich v. Woolcott*, 3 Cowen, 231, is certainly an authority for saying that words of more equivocal meaning than these will sustain a verdict, there being an averment that they were meant and understood to charge a crime; and I collect from the reasoning of the court, that they would have held the declaration good against a demurrer. A man says of another he will get drunk, he will lie or use profane language; would the hearer doubt that a charge of his being habitually addicted to such vices,

White v. Osborn.

was intended? And supposing them to be slanderous, which they would be in some cases, as if uttered of a clergyman, who would deny that such an import might be directly affixed to them, by a mere innuendo? *A fortiori*, if followed by stating that the vices insinuated in such a form could be proved?

We think the demurer is ill taken; and that judgment must be for the plaintiff.

WHITE vs. OSBORN.

Trover may be maintained by one tenant in common against another where the latter sells the whole property held in common, although it be not removed beyond the reach of the plaintiff; he may take possession of the property when opportunity offers, but he has an election to do so, or bring *trover*.

THIS was an action of *trover*, tried at the Clinton circuit in June, 1836, before the Hon. ESEK COWEN, then one of the circuit judges.

The plaintiff and defendant were tenants in common of a sloop called the *General Warren*, navigated on Lake Champlain, and employed in the transportation of lumber from *Plattsburgh* and other ports on the lake to *Whitehall*; the plaintiff owning *one-eighth* and the defendant *three-eighths* of the vessel. On 10th February, 1832, the defendant sold the sloop to one Peter Comstock, for the sum of \$2400. After the purchase Comstock continued the vessel in the same business. In the spring of 1834, a demand was made of the defendant, in behalf of the plaintiff, to restore the *one-eighth* of the vessel; to which he answered that he had none of the plaintiff's property in his possession. This suit was commenced in December, 1835. Since 1830, with the exception of one year, the plaintiff resided on the shore of Lake Champlain, where he could see the vessel passing in her trips to and from *Whitehall*, as she was obliged to pass within a short distance of his door. The vessel had undergone no change since the purchase by Comstock, ex-

cept that she was called the General Warren of *Whitchall*, instead of the General Warren of *Plattsburgh*. The plaintiff having rested, the defendant moved for a nonsuit on the ground that the parties being tenants in common, the action of *trover* would not lie. The judge refused to nonsuit the plaintiff.

The defendant produced in evidence the record of a judgment of the supreme court of Vermont, in favor of the plaintiff against one Cyrus Smith, from which it appeared that in August, 1830, Smith, on an *attachment* sued out by the now defendant, seized the same vessel for a debt owing to the now defendant from one *Griffin*, who was then the owner of *seven-eighths* of the vessel; that for such seizure an action was brought by the plaintiff against Smith, and a recovery had to the amount of \$960,98. The plaintiff then proved that in the suit against Smith he claimed to recover on the ground that the sloop had been pledged to him by *Griffin*, until from her earnings he should be paid a debt due to him from Griffin, and that upon that occasion no claim was made as to the *one eighth* of the vessel which belonged to himself. The evidence was objected to by the defendant, but was admitted by the judge. The defendant then proved that he purchased *seven-eighths* of the vessel at a sale of the same by virtue of an execution issued on a judgment in the cause commenced by him as aforesaid against Griffin. He also proved that the judgment against Smith had been fully satisfied. The evidence being closed, the counsel for the defendant insisted and requested the judge so to charge the jury: 1. that the parties being tenants in common of the vessel, the plaintiff, under the circumstances of the case, was not entitled to maintain this action; 2. that the judgment in Vermont was a bar to this action; and 3. that although the jury should find that the recovery in Vermont was only for the interest pledged by Griffin, yet the plaintiff was not entitled to maintain this action, because he could not divide or split up his demand or cause of action, but should in the action in Vermont have claimed a recovery for the whole vessel. The judge, after expressing his doubts as to the plaintiff's right of recovery,

White v. Osborn.

said, that for the purpose of enabling the parties to obtain a more deliberate consideration of the question involved, he would direct the jury to find for the plaintiff upon the principal question; and he did so accordingly. As to the judgment in Vermont, he decided it was no bar. The jury found for the plaintiff for the one-eighth of \$2400, with the interest thereof. The defendant asks for a new trial.

J. L. Wendell, for the defendant. One tenant in common of a chattel cannot maintain *trover* against his co-tenant for the mere sale of the property, unless in consequence of such sale by one, the property be placed beyond the reach of the other; Bull. N. P. 34; whilst it remains where he can exercise as against the purchaser the right which before he might have exercised as against the vendor, viz. "*to take possession when he can see his time*," he can bring no action. Such is declared to be the law by Lyttleton, § 323, endorsed by Coke, Co. Litt. 189, b, and this has ever since been the law, say this court in *St. John v. Standring*, 2 Johns. R. 468. It cannot be denied, however, that notwithstanding this unqualified acknowledgment of the law as laid down in Lyttleton, this court did, in *Wilson v. Reed*, 3 Johns. R. 175, lay down the proposition in reference to the right of action by one tenant in common against the other, that there is no distinction between a sale and a total destruction of the chattel by the party against whom the action is brought. This was going farther than the facts of the case required, and beyond what the counsel asked in whose favor the decision was made. They placed the right to recover upon the distinction that by the sale of the property in that case, and its subsequent consumption, it was put beyond the reach of the plaintiff; admitting that if he could have regained possession he would have had no right to bring *trover*. This distinction was taken upon the trial of *Wilson v. Reed*, and alluded to by the court in *Mersereau v. Norton*, 15 Johns. R. 179, in which latter case the law as laid down in Lyttleton is re-asserted and the case of *Wilson v. Reed* virtually overruled. It is also insisted for the defendant, that if the sale of the vessel in 1832 gave a right of action,

White v. Osborn.

then the previous sale in Vermont gave a similar right ; and if so, the plaintiff should in that action have claimed compensation for the whole vessel, and not brought two actions when one would have disposed of the whole matter.

G. A. Simmons, for the plaintiff, insisted that the action ought to be maintained ; that the old idea of physical destruction being necessary to give this action to one tenant in common against another, was too narrow. That the true rule is this : if a co-tenant does any act, in respect to the common property, inconsistent with the rights which he may lawfully exercise : as if he exerts a power or control over it which his situation does not authorize, as in the present case, when he undertakes to sell the property as his own, he subjects himself to an action. The counsel then cited and commented upon many cases, most of which being noticed in the opinion of the court, are not here adverted to.

By the Court, COWEN, J. There is no foundation for saying that the suit in Vermont was a bar. The judgment being satisfied, and the defendant having been a co-trespasser with the deputy, it was a bar to any farther action founded on the *lien* for Griffin's debt, but nothing more. The alleged conversion of the *one eighth*, the gravamen of the present action had not yet taken place. That arose, if at all, from the sale of the sloop and the consequent exclusive dominion exercised by Comstock, the purchaser.

The objection of the defendant is, that a general bill of sale by him of the whole, though followed by an exclusive claim and dominion in the purchaser, is not adequate evidence of a conversion as against his co-tenant. The contrary has been often said without qualification. *Spencer, J.* in *Wilson v. Reed*, 3 Johns. R. 178. *Woodworth, J.* in *Hyde v. Stone*, 9 Cowen, 232. *Sutherland, J.* in *Mumford v. McKay*, 8 Wendell, 444. 2 Kent's Comm. 350, 3d ed. note. *Mattocks, J.* in *Tubbs v. Richardson*, 6 Verm. R. 447. *Abbott, Ch. J.* and *Bayley, J.* in *Barton v. Williams*, 5 Barn. & Ald. 395. And it has been distinctly held, where the

White v. Osborn.

sale was such as to work a total destruction : as by retailing rum held in common, *Wilson v. Reed*, 3 Johns. R. 175 ; or selling grain, *Mumford v. McKay*, 8 Wendell, 442—these were total sales of consumable articles, the almost certain consequence of which would be a physical destruction.

In *Wilson v. Reed*, the judge at the circuit denied that the rule applied to the scale beams sold, and in suit in the same action with the rum, but that question was not reviewed on the motion for a new trial.

But we think *Hyde v. Stone*, 7 Wendell, 354, goes the whole length of the plaintiff's claim here. There the plaintiff, a tenant in common, sued his co-tenant for a sale of household furniture, farming utensils and other personal property, some of which the defendant admitted he had sold, and that others were destroyed ; and on his refusing to account for and deliver the goods, the plaintiff was allowed to recover his interest in the whole without distinction between what was sold and what was lost. The evidence of conversion was the simple admission of the defendant, that a part had been sold and a part destroyed.

That a mere sale by one tenant in common of the entire chattel is itself a conversion, is also presumed to accord with the general sense of the profession, and the course of decisions at the circuit, at least in this state. *Jennings v. Lord Granville*, 1 Taunt. 241, is not incompatible with the doctrine. It conceded that a sale may work a conversion, if it put the property beyond the reach of the co-tenant ; but denied the action of trover, because, though the property in dispute, a whale, was converted by extracting the oil, &c., yet this was but converting it to its proper use, and the plaintiff might still take the oil. There was no sale, but a mere refusal to deliver. *Tubbs v. Richardson*, 6 Verm. R. 442, which was a sale by one tenant in common of a part of certain wool, being less than his own share, though he refused on demand to deliver the residue, denied an action on the same principle.

On the whole, though there may be exceptions, we think, as a general rule, that a sale of the whole chattel by one tenant in common entitles his co-tenant to an action of *trover*.

White v. Osborn.

And a general sale, such as indicated by this bill of sale, without restricting it to part, is *prima facie*, at least, evidence of a total sale. In legal effect, to be sure, it passes but the share belonging to the vendor, and the co-tenant who is not consulted may so consider it, and take the property when opportunity offers. But he may, at his election, bring trover.

New trial denied.

END OF JANUARY TERM.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW-YORK,
IN MAY TERM, 1839, IN THE SIXTY-THIRD YEAR OF THE INDEPENDENCE OF THE
UNITED STATES.

HEWIT vs. PRIME.

An action on the case may be sustained by a father for the seduction of his daughter without proving any actual loss of service ; it is enough that the daughter be a minor residing with her father, and that he has the *right to claim her services.*

In such action a plaintiff may show in proof in aggravation of damages, any circumstances the natural consequences of the principal act, although they did not transpire until after suit brought.

A physician consulted by the defendant as to the means of producing an abortion, is not privileged from testifying, by the statute forbidding a disclosure of information received by a physician to enable him to prescribe for a patient.

THIS was an action on the case tried at the Essex circuit, in June, 1835, before the Hon. ESEK COWEN, then one of the circuit judges.

The suit was brought for the seduction of a daughter of the plaintiff, of the age of about *seventeen*, whilst she was a member of the family of her father. She became a mother in April, 1835, and this suit was commenced on the *thirteenth* day of *September* preceding, after she became preg-

Hewitt v. Prime.

nant. On her examination in chief, she testified that she was persuaded by the defendant to swear the child upon some person other than himself, on his promising that if she would do so, he would marry her, and that she accordingly made oath before a justice, on the *fifth* day of September, that the child with which she was pregnant was begotten by *Benjamin Flanagan*, a fictitious person. The justice took her examination and reduced it to writing, which she signed; but he testified that this was done without any application from the overseers of the poor. The plaintiff also proved by a practising physician that about the first of September, 1834, the defendant repeatedly applied to him for drugs to produce an abortion, and upon one of those occasions told him that the female gotten with child was the plaintiff's daughter. This physician stated that he had told two individuals that the defendant did not mention the name of any girl in the conversations had with him. The counsel for the defendant objected to the physician's testifying to any thing that was said by the defendant when applying for medical advice, whether such advice was for himself or another; but the objection was overruled. The evidence being closed, the counsel for the defendant requested the judge to charge the jury, that to sustain the action it was necessary the plaintiff should have proved loss, expense or damage, before suit brought, in consequence of the seduction; that the daughter was an incompetent witness, by reason of the oath taken before the magistrate; or if not incompetent, that she was not entitled to belief. The judge charged the jury that the daughter being in her minority, a member of the family of her father, and under his control at the time of the seduction, no loss, expense or damage, prior to the suit, need be shown; it was enough to prove the seduction. That the oath taken by the daughter before the magistrate not having been taken on the application of the overseers or superintendents of the poor, was extra-judicial, and did not disqualify her as a witness; but that in consequence of such oath, no reliance could be placed upon her testimony given at the trial, otherwise than as it was confirmed by the evidence of the physician; and if they believed him, they

Hewitt v. Prime.

must find for the plaintiff, otherwise for the defendant. The jury found for the plaintiff. The defendant asks for a new trial.

A. C. Hand, for the defendant.

G. A. Simmons, for the plaintiff.

By the Court, NELSON, Ch. J. The witness, (the physician,) I think, was not privileged. It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute; and it is certain that the information given was not essential to enable him to prescribe for the patient, if the daughter of the plaintiff should be considered a patient in respect to the transaction. 2 R. S. 406, § 73.

The judge ruled in the course of the trial, that no *actual loss of service, expense or damage*, prior to the commencement of the suit need be shown; that the proof of the seduction was sufficient under the circumstances, pregnancy having ensued, and the daughter being a minor and a part of her father's family at the time. It is now fully settled both in England and here, *Maunder v. Venn*, 1 Mood. & Malk. 323, Peake's N. P. 55, 233, 2 Stark. Ev. 721, 9 Johns. R. 387, 2 Wendell, 459, 7 Carr. & Payne, 528, that *acts of service* by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. If it were otherwise, says Littledale, J. in *Maunder v. Venn*, no action could be maintained for this injury in the higher ranks of life, where no actual services by the daughter are usual. After this, I do not perceive how we can consistently maintain that proof of actual *loss of service* is indispensable to uphold the action. If it may be sustained upon the mere right to claim them, or in the language of the cases, upon the supposed services, where none were ever rendered in fact, the ground of it, in the supposed case, precludes the possibility of any actual loss.

Hewitt v. Prime.

Such is the spirit of the more recent cases, as will be seen by a reference to those above cited.

It was conceded by Hullock, serjeant, for the defendant in *Revell v. Salterfit*, 1 Holt, 450, that in most of these cases, the condition of service was regarded as a mere conveyance to the action. It was the form, he said, through which the injury was presented to the court; and having obtained its admission, upon legal principles, it brought along with it all the circumstances of the case.

The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the *mere right to claim* the services; they frequently admitted the most trifling and valueless acts as sufficient. In the case of *Clark v. Fitch*, 2 Wendell, 459, there was no proof of actual loss. And *Martin v. Payne*, 9 Johns. R. 387, was decided upon the ground that none were necessary. The only actual *liability* of the father that appeared in the former case, were for the expenses of the lying in, which have never been regarded as the foundation of the suit; they are received in evidence only by way of enhancing the damages. It is apparent from a perusal of the modern cases, and elementary writers in England, upon this subject, that the old idea of *loss of menial services*, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the domestic relations; these are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous and innocent daughter, is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person, by the guilty seducer, is considered ground for damages, consistent even with the first principles of the action. The loss of these qualities, even in regard to menial services, would necessarily greatly diminish their value.

The action then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by

 Smith v. Clark.

way of aggravating the damages. It is not necessary that these should all transpire before suit brought ; if they are the natural consequences of the guilty act, they are but the incidents which attend, and give character to it.

Upon these views I concur with the learned judge who reviewed the case below, in denying a new trial.

New trial denied.

 SMITH and others vs. CLARK.

Where a contract was made between a miller and other persons, for the manufacture of wheat into flour, he engaging on his part for every four bushels and 55 pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation or understanding that the wheat delivered should be kept *separate* from other grain, or that the *identical wheat* should be returned in the form of flour: it was held, that the transaction between the parties constituted a *sale* and not a *bailment*, and that the owners of the wheat could not maintain an action for the conversion of the flour manufactured from the wheat.

It was further held in this case, that even had the flour after its manufacture been delivered by the miller to the other parties, but permitted to remain in his possession, that they could not maintain an action of *replevin* in the *ce-pit* against any person, who subsequently came to the possession of the same by *delivery* from the miller ; to charge such person, the action should have been in the *detinet* only.

THIS was an action of *replevin* tried at the Yates circuit in June, 1838, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The plaintiffs declared for the *taking* and *detaining* of 75 barrels of wheat flour. The defendant pleaded *non cepit* and *property* in himself. On the trial the following facts appeared : Charles Hubbard owned a flouring and custom mill on the outlet of the Crooked lake. In December 1834, the plaintiffs made an agreement with him to deliver wheat at his mill, and he agreed that for every 4 bushels and 55 pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection in Albany or New York. The plaintiffs

Smith v. Clark.

purchased from farmers and others, nearly 2000 bushels of wheat which was from time to time delivered at the mill, and put into a bin with other wheat which Hubbard purchased on his own account; and with the *toll wheat* taken by him from time to time. Hubbard delivered 230 barrels of flour to the plaintiffs, but that was not enough to satisfy his contract. On the 25th March, 1835, he sold 100 barrels of flour to the defendant, and in May following, delivered him the 75 barrels of flour in question, in pursuance of the contract of sale. The plaintiffs brought this action and arrested the property on board a canal boat, in which the defendant had caused it to be shipped for market. Hubbard also sold between 30 and 50 barrels of flour at retail, and took 10 or 12 bushels of wheat for his own use. All the wheat manufactured and used by Hubbard was taken from the same bin. The plaintiffs attempted to prove that the 75 barrels of flour in question had been delivered to them by Hubbard.

The defendant moved for a nonsuit, which was refused, and raised other questions on the charge of the judge, which are noticed in the opinion of the court. The jury, under the charge of the judge, found a verdict for the plaintiffs, and the defendant now moved for a new trial.

H. Welles & S. Stevens, for defendant.

S. Cheever, for plaintiffs.

By the Court, BRONSON, J. The contract between the plaintiffs and Hubbard was, in effect, one of sale—not of bailment. The property in the wheat passed from the plaintiffs at the time it was delivered at the mill, and Hubbard became a debtor, and was bound to pay for the grain in flour, of the specified description and quantity. There was no agreement or understanding, that the wheat delivered by the plaintiffs should be kept separate from other grain, or that this identical wheat should be returned in the form of flour. Hubbard was only to deliver flour of a particular quality, and it was wholly unimportant whether it was manufactured from this or other grain. Jones on Bail. 102, 64.

Smith v. Clark.

A different doctrine was laid down in *Seymour v. Brown*, 19 Johns. R. 44 ; but the authority of that case has often been questioned, 2 Kent, 589 ; Story on Bail. 193-4, 285 ; *Buf-fum v. Merry*, 3 Mason, 478 ; and the decision was virtually overruled in *Hurd v. West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter v. Green*, 1 Rand. (Va.) R. 3, is much like *Seymour v. Brown*. They were both hard cases, and have made bad precedents.

There was, I think, no evidence which would authorize the jury to find that the flour in question had been delivered by Hubbard to the plaintiffs. There certainly was no direct evidence of that fact, and Hubbard himself testified expressly that there had been no delivery. The proof given by the plaintiffs of what Hubbard had said to others about the flour in the mill, was not necessarily inconsistent with his testimony.

But if there had been a delivery, so that the property in the flour passed to the plaintiffs, they still labor under a difficulty in relation to the form of the remedy. Notwithstanding the transfer, the property was left in the possession and under the care of Hubbard. * He was a bailee of the goods, and as such would have been answerable to the plaintiffs for any loss happening through gross negligence on his part. The defendant took the flour on delivery from the bailee, who had a special property in it. Such a taking is not *tor-tious*. *Marshall v. Davis*, 1 Wend. 109. *Earll v. Camp*, 16 Wend. 570. The plaintiffs should have counted on the *detention*, not on the *taking* of the goods. *Randall v. Cook*, 17 Wend. 57. 10 Wend. 629. There must be a new trial.

New trial granted.

The People v. Caswell.

THE PEOPLE vs. CASWELL.

Where in an indictment for receiving stolen goods, the charge was that the prisoner had feloniously received of an ill-disposed person, to the jurors known as *Deman Boyce*, a cow, the property of, &c., which had then lately before been stolen by the said ill-disposed person, with the knowledge of the felony, and the verdict of the jury was that the prisoner was *guilty of receiving the cow* charged in the indictment as stolen property, *knowing her to be stolen*, without finding by whom the property was stolen, the conviction was held proper, and a judgment rendered upon the verdict was affirmed.

ERROR from the Monroe general sessions. The prisoner was indicted for that he, on, &c. at, &c. a cow, the property of &c. by a certain ill-disposed person to the jurors aforesaid [i. e. the grand jurors] known as *Deman Boyce* then lately before feloniously stolen, of the same ill-disposed person feloniously did receive, well knowing the same to have been feloniously stolen. The prisoner was tried, and the jury found him guilty "for *receiving the cow* charged in the fourth count of the indictment as stolen property, *knowing her to be stolen*." The court sentenced him to six months imprisonment in the county jail and to pay a fine of \$150. The prisoner sued out a writ of error, and the cause was argued at the last term by.

S. Stevens, for the prisoner.

S. Beardsley, (attorney general,) for the people.

By the Court, COWEN, J. The first objection is, that the petit jury do not find that the cow was stolen by any one, and certainly not by an evil disposed person known as *Deman Boyce* to the grand jury. This is supposed to be a material averment, which must be found as laid. The single question is, whether it be material in making out the crime of receiving goods, that the thief should be named or described. If it be material, the verdict is defective; otherwise not. In *Mackalley's case*, 9 Rep. 61, 67, the indictment, which was for murder, charged that an officer in ex-

The People v. Caswell.

ecuting his duty under a sheriff's precept particularly set forth, was killed. The jury found that there was no precept, and yet that officer was acting in the execution of his duty. The verdict was held good as finding the substance of the charge, viz. that the officer was killed in the execution of his office, which was therefore murder; and the precept was said to be but a mere circumstance, not material to allege, and therefore it need not be proved. See also as to this rule, 1 Ch. Cr. Law, 559, ed. 1836.

The statute of receivers is general, that it shall be penal for a man knowingly to receive personal property stolen from another. 2 R. S. 567, § 71, 2d ed. And see *Hopkins v. The People*, 12 Wendell, 76. In *Thomas' case*, 2 East, P. C. 781, the indictment was that the prisoner had received goods stolen by a person to the grand jurors unknown. On conviction it was objected that the indictment was defective, it not naming the principal thief. The objection was overruled, the judges remarking, that the great view of the statutes was to reach the receivers where the principal thieves could not be discovered. "In another and later case, the prisoner was convicted on a like indictment, though the grand jury finding the indictment did in truth know the principal thief, for they had before returned an indictment against him by name. On the question being submitted to the judges, they held that the second indictment was not vitiated by that circumstance; and though the knowledge of the grand jury was in evidence on the trial, they would not interfere. *Re v. Bush*, Russ. & Ry. Cr. Cas. 372. The ground on which this decision was made is not stated. It was certainly shown very satisfactorily that the grand jury believed that one Moreton, whom they had first indicted by name was the thief. The indictment of Bush, the accessory, is treated as a second indictment, and the judges say simply that the finding of the other was no objection to the second.

The receiving of stolen goods is, in its own nature, an offence, if they be known by the receiver to have been stolen: and if directly alleged to have been stolen by A., it is difficult to conceive that the prisoner should be able to defend

 Barnard v. Viele.

himself either by proving that they were stolen by B., or the failure of the evidence for the prosecution to show a thief in particular, so long as the accused knew that they were stolen. The one who delivers them to him may declare that they were stolen by another, who is desirous that his name should remain a secret from all the world; yet if he receive them, he is as guilty as if the deliverer had admitted himself to be the thief. It cannot therefore be an essential matter of description that any one in particular committed the theft; and if one be named, this may be passed over as a mere circumstance, as well, if not even on better reason than the precept in *Mackalley's case*. In *Pye's case*, 2 East. P. C. 785, 1 Leach, 352, note, S. C., the robbery was charged as having been committed in *Wilday's house*, but was not proved to have been committed there; and such proof was held to be unnecessary. See also *Rosc. Cr. Ev.* 82, and the cases there cited. We think, on the whole, that enough was found by the jury in the court below to make out a complete offence.

An exception is taken to the indictment; but it follows that if it be unnecessary, as we think it is, even to name the thief, then in whatever way he may be described by the indictment, it cannot be complained of as defective. It may be rejected as surplusage.

The judgment of the court below must be affirmed.

 BARNARD and others vs. VIELE and another.

A *bail bond* must be conditioned that the defendant will appear by putting in special bail within twenty days after the return day, &c. in the terms prescribed by the revised statutes, or it will be void; a bond in the form used under the old statute is a nullity.

DEMURRER to declaration. The plaintiffs declared upon a *bail bond* executed by the defendants to relieve *Viele*, one of the defendants, from an arrest on a *capias ad respondendum*. In the declaration the condition of the bond was stated to be that *Viele* "should appear in a certain action commenced by the said writ by putting in special bail

Barnard v. Viele.

within twenty days after the return day specified in the said writ, according to the custom of our said court." The defendants craved oyer of the bond, and after setting it forth, by which it appeared that the condition thereof was, that Viele "should appear before our justices, &c. at the capitol, &c. on the third Monday of October next, to answer unto Henry Barnard, &c. in a plea of trespass; and also to a bill of the said plaintiff for a certain debt of \$155, against the said Samuel D. Viele, to their damage of \$300, according to the custom of our said court, before our said justices then and there to be exhibited," put in a demurrer.

M. T. Reynolds, for the defendant. This bond is *void*, not being conformable to the statute, 2 R. S. 348, § 11, which requires that the bond shall be conditioned that the defendant will appear by putting in special bail within twenty days after the return day specified in the writ, and by perfecting such bail if required, according to the rules and practice of the court. The change in the statute from what it formerly was, is not *accidental* but *intentional*, as is manifest from the revisers' notes, 3 R. S. 720. But if this be not so, the declaration is bad in setting forth a condition *variant* from the condition of the bond.

S. Stevens, for the plaintiff. The bond is good. It requires nothing inconsistent with the statute. The construction given to bonds similar to that taken in this case has always been, that putting in bail within twenty days after the return day was a performance. The statute, therefore, was substantially complied with, and that is enough. 12 Wendell, 306. 10 id. 370. It is not necessary to declare in the very terms of the condition; if a bond be declared upon according to its legal effect it is sufficient. 4 Maule & Sel. 338. 4 Com. Law. R. 431. 14 id. 166.

By the Court, NELSON, Ch. J. The demurrer is well taken. The statutes prescribe the terms of the condition of the bail bond, and it must be complied with. It differs from the old statute, 1 R. L. 423, § 13. Although the terms

Hanna v. Mills.

prescribed in the *new*, were before, according to the practice of the court, necessarily to be complied with in performing the condition of the *old* bond, and therefore the old and new conditions would seem to be in legal effect the same, still the terms are now, by the statute, to be expressed in the condition. The legislature may have thought this useful, as advising the parties distinctly what is essential to performance—an idea suggested by the revisers, and which doubtless led to the change.

We may regret the departure from a form and usage which had so long been in existence, for the attainment of so unimportant an object, but this affords no ground for disregarding a positive enactment. Besides, another section of the revised statutes, 2 R. S. 286, § 59, is very explicit, that no sheriff or other officer shall take any bond, &c. by color of his office, in any other manner than such as are provided by law; and if he does, it is declared that the bond shall be void.

Judgment for defendants.

HANNA vs. MILLS & HOOKER.

Where goods are sold to be paid for by a note or bill, payable at a future day which is not delivered according to the terms of sale, the vendor may sue immediately for a *breach of the special agreement* and recover as *damages*, the whole value of the goods, allowing a rebate of interest during the stipulated credit; he cannot, however, maintain *assumpsit* on the *common counts* until the credit has expired.

A declaration averring a sale of goods to be paid for by a note of the purchaser with an *endorser satisfactory to the vendor*, is not supported by proof, that the goods were sold at auction on a notice in this form: "Terms of sale—over \$100, six months—satisfactory notes," without evidence that *satisfactory notes* according to *mercantile usage*, mean *notes with satisfactory endorsers*.

In *assumpsit* where *non assumpsit* and *payment* are pleaded, and the jury pass upon the first plea finding a verdict for the plaintiff, *error* will not lie for the omission to pass upon the second.

ERROR from the superior court of the city of New York. This was an action of *assumpsit* by *Mills and Hooker* against *Hanna*. The plaintiffs in the first count of the

Hanna v. Mills.

declaration set forth a special agreement, made 9th March, 1836, by which the defendant in consideration that the plaintiffs would sell and deliver to him certain goods of the value of \$1477 93, undertook and promised to pay the plaintiffs for the goods by a promissory note to be made by the defendant for the said sum of money, bearing date the 9th day of March, 1836, payable six months after date *to the order of, and endorsed by a person who should be satisfactory as such endorser to the plaintiffs*. Averment that the goods were delivered on the same day and the note demanded, but not given, &c. The *second count* was on a like sale of goods to the amount of \$240 80 on the 24th March, 1836. The declaration also contained the common counts for goods sold and delivered, &c. The suit was commenced 28th April, 1836. The pleas were *non assumpsit*, and payment. On the trial the plaintiffs proved the sale and delivery of the two parcels of goods. The sales were at auction, and the terms thereof as expressed on the sales book, were as follows: "Terms of sale, over \$100—six months, satisfactory notes." The plaintiffs' clerk testified that the goods were delivered, and that he called on the defendant and demanded his *notes with satisfactory endorsers according to the terms of sale*. The defendant moved for a nonsuit on the ground that the proof of the terms of sale did not support the declaration. The motion was overruled, and the defendant excepted. The jury, as appears from the record, found that the defendant *did undertake, &c.*, and assessed the plaintiffs' damages at \$1730 06; but did not pass upon the issue taken on the plea of payment. Judgment having been rendered for the plaintiffs, the defendant sued out a writ of error.

S. Stevens, for the plaintiff in error.

M. T. Reynolds, for the defendants in error.

By the Court, BRONSON, J. Several objections are taken to this judgment.

1. It is said that the jury did not pass upon the issue on the plea of payment. The verdict is only informal—not

Hanna v. Mills.

defective in substance. Payment might have been given in evidence under the general issue, as well as under the special plea; and if it was proved, the jury could not have found for the plaintiffs on non-assumpsit. The jury have therefore in effect, though not in form, passed upon both issues. *Law v. Merrills*, 6 Wendell, 268. This is not like the case of *Boynston v. Page*, 13 Wendell, 425, on which the plaintiff in error relies. There the jury in an action of replevin found for the plaintiff on the plea of *non cepit* without taking any notice of another plea, of property, in a third person, and justifying the taking under an attachment. This matter could not have been given in evidence under the plea of *non cepit*; and the second issue was not at all involved in the first. It might very well be that the defendant took the goods, and that he had a right to do so, because they belonged to the third person against whom he had an attachment. The verdict did not go to the question of property in the goods—neither directly, nor by necessary implication; and consequently it could not authorize a judgment for the plaintiff. But here the verdict, though informal, covers the whole ground.

2. When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. 4 East, 147. 3 Bos. & Pul. 582. 9 East, 498. 3 Camp. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless perhaps there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill, as it can be after the credit has expired. The only difference between suing at one time or the other, relates to the *form of the the remedy*; in the one case the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are

Hanna v. Mills.

the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld.

3. According to the terms of sale, the purchaser was to pay for the goods by a *satisfactory note*. The contract laid in the declaration is to pay for the goods by a note to be made by *the purchaser*, payable to *the order of, and endorsed* by a person who should be satisfactory as such endorser to the vendor. It is not improbable that persons acquainted with the course of this business may have understood the terms of sale as the pleader has expounded them. But there was no proof that the words had acquired any peculiar meaning among merchants, and I am unable to say that a satisfactory note necessarily means either a note of *the vendee* or an *endorsed note*. For aught I can see, the note of a third person of undoubted solvency, or a note of the vendee with sufficient sureties, would have been a performance of the contract of sale. Much as we may regret the necessity of reversing the judgment on this narrow ground, I think the objection that the proof did not support the declaration cannot be got over. The defendant will probably gain nothing in the end by the writ of error. The costs will be ordered to abide the event, and on another trial the plaintiffs may be able to help out their case by further evidence, or the court may allow such an amendment as will avoid the question of variance.

Judgment reserved.

Foster v. Newland.

FOSTER vs. NEWLAND.

- Where a *debtor* admits to a third person an existing balance due from him on a bond or other chose in action, and upon the strength of such admission such person takes an assignment of the bond or other chose in action, the debtor in a suit subsequently brought for the recovery of such balance is *estopped* from showing a claim against the original creditor for the purpose of reducing the amount of the recovery, although the assignment was taken for a *precedent debt*.

THIS was an action of debt, tried at the Saratoga circuit, in December, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The plaintiff declared upon a bond bearing date 31st March, 1832, executed by the defendant in the penal sum of \$2500, containing a *recital* that the defendant had on that day bought of the plaintiff a lot of land for \$1250; that there was a mortgage upon the land executed by the plaintiff; and that there were three notes, for the payment of which the defendant was bound as surety for the plaintiff—and *conditioned* that the defendant would pay to the plaintiff *such sum as should remain due* to the plaintiff after the settlement and discharge of the mortgage and notes above referred to. After setting forth the bond with its recital and condition, the plaintiff averred that after the settlement and discharge of the mortgage and notes, *there remained due* the sum of \$300, and concluded with the usual breach of non-payment. The defendant pleaded *nil debet*, and gave notice of *set-off*. On the trial of the cause a witness was called on the part of the plaintiff, who testified that on 25th March, 1834, he took an assignment of the bond declared upon; that previous to taking such assignment, he called upon the defendant and informed him that the obligee was indebted to him (the witness) in the sum of \$150, and proposed to assign the bond in question to him, and asked the defendant whether that sum was due upon the bond? That the defendant answered that the sum of \$150 was due thereon, over and above the mortgage then in con.

Foster v. Newland.

troversy, and advised the witness to take the assignment. The witness stated that relying upon such assurance of the defendant, he on the same day took an assignment of the bond, and held the same until the morning of the day on which he was then testifying, when he assigned his interest on the bond to a third person, who it was shown had *indemnified* the witness against his liability to costs in this action. This witness further testified, that a decree had been made by the vice chancellor which disposed of the mortgage and left a balance of six or seven hundred dollars due upon the bond. That an appeal from such decree had, however, been taken, and was still pending. The plaintiff having rested, the defendant moved for a *nonsuit* on the ground that no evidence had been given showing that the mortgage and notes mentioned in the condition of the bond had been settled. The judge decided that enough had been shown to authorize a verdict for \$150, with the interest thereof, and therefore refused to nonsuit the plaintiff. The defendant then offered to prove a *set-off* against the *nominal* plaintiff, which the judge held to be inadmissible, and the jury under his direction found for the plaintiff with \$189 29 *damages*, and six cents costs. The defendant asks for a new trial.

N. Hill, jun. for the defendant.

A. C. Paige, for the plaintiff.

By the Court, COWEN, J. The only point seriously insisted on is, that a settlement of the mortgage and note was a condition to the plaintiff's right of recovery, and that such settlement was not proved. The amount of the defendant's admission was that there was more than \$150 due, over and above the mortgage which was then in controversy. This clearly imported that the notes were settled and paid; and after what the defendant said to Ellsworth the assignee who acted upon the representation, he is, we think, estopped to deny that so much is due, absolutely and presently. Ellsworth became an assignee on the faith of what the defendant said; and there are numerous cases that after thus tak-

Foster v. Newland.

ing an assignment upon the faith of what the debtor says, as to the validity or balance or other circumstance of the claim, he is estopped to impeach it by set off, payment, or even by showing that it arose on an illegal consideration. *Buchanan v. Taylor*, Addis. Rep. 155. *Carnes v. Field*, 2 Yeates, 541. *Weaver v. M'Cord*, 14 Serg. & Rawle, 304. *Davison v. Franklin*, 1 Barn. & Adolph. 142. There was no pretence of mistake or fraud; and the defendant's language might be taken as waiving a formal settlement of the mortgage. It is like an endorser waiving notice of dishonor. Though he may, if he choose, insist upon it as a condition, he shall not be heard to do so, after he has with full knowledge of all the facts promised to pay.

All Ellsworth's rights passed to T. Palmer. It is true that the assignment was taken by Ellsworth as security for a pre-existing debt; and that may, according to the doctrine which prevails in this court, with regard to commercial paper, be said to detract from the *bona fides* of the purchase. *Ontario Bank v. Worthington*, 12 Wend. 598 to 601. To conclude the defendant in the latter case, the assignee must part with some right on the credit of the paper. The doctrine has never been extended to the transfer of a chose in action specially accepted on the faith of an admitted debt at the time; and it ought not to be. At such a rate an assignee can never be safe in taking paper to secure a previous debt. He tells the defendant his object, who replies, "Yes, the paper was on good consideration and valid, and all obstacles to payment are removed. Take it as security." What is this but promising on an original consideration to pay; what is it but saying, if you will take an assignment, I will be bound? The assignment is taken, an action brought and costs incurred; and it would be to sanction the sheerest fraud, were we then to allow a defence. The cases are numerous, and go on the ground of an estoppel *in pais*. The defendant draws the plaintiff into a series of action and expense, and meets him at the trial, with the declaration that all he said was false; therefore the plaintiff must lose his security and pay the costs. In *Hall v. White*, 3 Carr. & Payne, 136, the defendant had admitted to the

Foster v. Newland.

plaintiffs that he had their deeds in his possession. In default, the defendant proposed to show that the deeds never had been in his possession. Best, Ch. J. held that he was estopped on the ground that his admission had led the plaintiffs into the suit; and he directed a verdict for such damages as should compel the defendant to surrender the deeds. There are, I venture, a dozen cases to the same effect. I will only say they all quadrate with sound legal morals. See *Welland Canal Co. v. Hathaway*, 8 Wend. 433.

Indeed the learned counsel who argued for the defendant hardly denied the general position that the plaintiff is entitled to the \$150; but he strenuously insisted that the action is premature, that although that sum is due, yet it is *debitum in presenti, solvendum in futuro*. That the right to demand payment hangs on a condition not yet fulfilled: the settlement both of *the mortgage and notes*. It is an answer that the notes are literally settled, and the mortgage substantially so. The defendant says "the latter has been repudiated in the vice chancery; but if it be restored on appeal, there is still \$150 due, over and above the mortgage. It is ascertained to be out of the way; it can never touch me as to that sum." This is settling to all substantial purposes at least; the money is admitted to be due at all events, and no time insisted on. Surely the condition is not confined to a technical *insimul computassent*. The meaning of the contract is that the defendant shall not be obliged to pay for the land twice; viz. to the plaintiff and also to Thompson. He agrees with the assignee in effect, that the mortgage shall be considered as settled so far as to fix the small balance for which the assignment is taken; and the judge by limiting the recovery to that balance, secured him against all injury.

New trial denied.

Webb v. Bindon.

WEBB vs. BINDON & McCrady.

Where lands were sold under an execution and the property conveyed by the sheriff to the purchaser, who sold the same to a third person, who reconveyed the premises to the first purchaser, it was held that the last deed was not void for champerty, although the grantor in the same, at the time of the execution, was not in the actual possession of the lands, they being at the time the subject of controversy by suit in court, the grantor having brought ejectment for the recovery of the lands—this decision being made on the principle that the defendants were quasi tenants of the grantor, and could not be deemed to hold adversely.

Evidence to show that, at the time of the reconveyance, the suit brought by the grantor had been settled and was ended, was held to be admissible notwithstanding the production of a record on the other side that the suit was pending, and further, that such evidence did not contradict the record. It seems, that by the alteration of the statute of champerty, the taking of a conveyance from a party in possession of lands, the subject of controversy by suit in court, is no longer forbidden.

THIS was an action of ejectment, tried at the Clinton circuit in January, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

The plaintiff on the 11th March, 1829, obtained a judgment against *Joseph Bindon*, for \$526 63, which was revived by *scire facias* against the defendants in this suit, alleging them to be devisees of the defendant in the original judgment. The judgment roll on the *scire facias* being docketed 15th November, 1833. An execution was issued reciting both judgments, and the premises in question in this cause were sold at public vendue and bought in by the plaintiff, to whom the sheriff of Clinton, on the 15th of April, 1835, executed a deed of the premises. On the day of receiving such deed the plaintiff conveyed the premises to one *Ralph Rawdon*, who on the 28th August, 1837, reconveyed them to the plaintiff. This action was commenced on the 14th October, 1837. The plaintiff having rested, the defendants produced the exemplification of the record of a judgment in an action of ejectment brought by *Ralph Rawdon* against the now defendants, in May, 1835, for the recovery of the identical premises claimed in the present ac-

Webb v. Bindon.

tion. From that record it appeared that the defendants put in a *demurrer* to the plaintiff's declaration, that an *imparlance* was granted until *October term*, 1837, when judgment was entered against the plaintiff for not joining in demurrer, and costs awarded against him. The record was filed on the 22d *November*, 1837. The defendants also proved that the now plaintiff had knowledge of the pendency of the suit in favor of Rawdon. To rebut the whole of this evidence the plaintiff offered to prove that the suit in favor of Rawdon was settled and ended previous to the conveyance from Rawdon to him. The judge viewing such evidence as contradicting the record produced, refused to receive it. The defendants now insisted that the deed from Rawdon to the plaintiff was *void for champerty*, it having been executed *during the pendency of the suit* brought by Rawdon. A verdict was thereupon entered for the plaintiff subject to the opinion of this court.

S. Stevens, for the plaintiff.

A. Taber, for the defendants.

By the Court, NELSON, Ch. J. The statute 2 R. S. 691, § 5, declares, that if any person shall take a conveyance of lands from any one *not being in the possession thereof*, while they are the *subject of controversy by suit in court*, knowing the pendency of such suit, and that the grantor was not in possession of such lands, he shall upon conviction be deemed guilty of a misdemeanor. This is an alteration of the old statute, or at least of the construction put upon it, so far as it does not prohibit a conveyance by a *person in possession* of the premises. 8 Johns. R. 479. He may now convey, notwithstanding the suit pending. The 1 R. S. 739, § 147, provides that every grant of lands shall be absolutely void, if at the time of the delivery thereof such lands shall be in the *actual possession* of a person *claiming under a title adverse* to that of the grantor. A deed in violation of the *fifth section* above referred to would be void at common law, the

Webb v. Bindon.

act being in violation of a penal statute; and if the conveyance to the plaintiff comes within it, it cannot be upheld, though it should be conceded not to be within the general provision of § 147. That section (147) however, being *in pari materia*, may aid us in the interpretation of the other; and looking at both, I am inclined to think that § 5 does not apply where the person in possession does not hold *adversely* to the grantor.

There is no reason, or principle of public policy, that should prohibit the landlord, or those holding that relation to the occupant, from going into the market with the property, pending a suit to oust him. To extend to a disloyal tenant the benefit of the *fifth section*, would enable him to avail himself of his own wrong, and multiply its injurious effects upon his landlord. Indeed, the *possession of the tenant* is, for many purposes, *that* of the landlord, and the case, therefore, does not come fully within the words of the statute. In this case, though the defendants were not strictly tenants of *Rawdon*, they were *quasi* tenants at will, and could not dispute his title. 1 Caines, 188. 10 Johns. R. 223, 292.

The pendency of the suit by *Rawdon* against the defendants was proved by the record; in answer to which the plaintiff offered to show that it was in fact settled before the reconveyance. *The deed bears date 28th August, 1837, and the judgment against *Rawdon* was entered in *October term* of that year. It may, I think, be doubted whether the proof offered went to impeach the verity of the record within the meaning of the rule. Phil. Ev. 223. 10 Johns. R. 51. The action may have been terminated by settlement of the parties previous to the reconveyance, consistent with the subsequent entry of the judgment. It is not, however, important to express an opinion on this point.

[The verdict having been entered in a manner which, in the opinion of the court, would not give the plaintiff as great an interest as he was entitled to, the court, instead of rendering judgment for the plaintiff, ordered a new trial.]

Lincoln v. Crandell.

LINCOLN vs. CRANDELL and others.

Where parties enter into contract under seal in their *individual characters* not describing themselves as *trustees, agents* or a *committee*, they are *personally responsible*, although they in fact contract as a committee in anticipation of the incorporation of a literary institution—*parol proof* is not admissible in such case to show that it was not intended that they should be personally liable.

QUESTION of parties. In contemplation of obtaining an act of incorporation of a literary association to be called the *De Ruyter Institute*, in the county of Madison, a meeting was held of persons called the directors of the institute on the 15th October, 1835, at which a committee was appointed to superintend the erection of an edifice for the purposes of the institute, consisting of *Henry Crandell, Perry Burdick, L. B. Goodwin, E. D. Jenks, and Ira Spencer*. On the 15th February, 1836, a contract was drawn up between those five last named persons on the one part, and the plaintiff on the other, by which the plaintiff agreed to do the mason work in the erection of a building 92 feet in length, 64 feet in width and of the height of 4 stories, and the other parties agreed to compensate him according to certain terms specified in the contract. The contract purported to be by the parties *in their individual characters*. On the day the contract was drawn up, it was signed by the *plaintiff* and by *Goodwin*, and left in the care of the person who drew it up. On 30th March, 1836, the institute was *incorporated*, and the five above named persons together with seven others were constituted by the act the first board of trustees. On 2d June, 1836, there was a meeting of the board of directors, at which the *building committee* presented their *contracts* for approval, which were approved by a resolution of the board. On the same day the contract was obtained from the depository, by *Goodwin*, and subsequently returned with the signatures of *Crandell, Burdick and Jenks* attached. The instrument was executed by the parties *under seal*. The plaintiff having performed the contract on his part and claiming a balance to be due to him,

Lincoln v. Crandell.

brought an action for the recovery of the same. The defendants proved payments to a large amount, but not to an amount sufficient to satisfy the plaintiff's claim. These payments were shown to have been made generally by drafts drawn by *Goodwin* as clerk of the building committee, upon *Spencer* as treasurer of the institute, which were paid by the treasurer and receipted by the plaintiff. The case was heard before referees, and on the hearing, the defendant offered to prove that they had uniformly refused to contract with the plaintiff in their *individual characters*, or in other words, to be *personally responsible* for the performance of the stipulations, and that such was the agreement of the parties. The plaintiff objected to the evidence offered, and the referees sustained the objection. The referees made a report in favor of the plaintiff for a balance of \$360 11. The defendants moved to set aside the report.

S. Stevens, for the defendants.

J. A. Spencer, for the plaintiff.

By the Court, BRONSON, J. The defendants covenanted for themselves as individuals. They did not describe themselves in the contract, nor sign it, as *trustees, directors, agents, committee, &c.*; and there is nothing in the contract from which it can be inferred that they either intended to bind any body but themselves, or that they were themselves unwilling to be personally bound.

In all the various forms in which the question was presented, the referees decided that the written contract could not be contradicted by parol proof that the defendants did not intend to be personally liable. They decided correctly—and this answers most of the exceptions taken on the hearing.

Although the trustees of the corporation on the 2d June, 1336, approved of the contract, it was none the less the undertaking of the defendants *individually*.

Motion denied.

Steele v. Whipple.

STERLE vs. WHIPPLE.

Where the holder of a note payable to himself, requested another person to procure the note to be discounted, who by placing his name upon it as an endorser procured it to be done, received the avails and paid over the same *except the sum of thirty dollars* which he retained for his endorsement and trouble in the matter; it *was held* that the transaction was *usurious*, and that the *usury* might be alleged in bar of a recovery of a subsequently substituted note.

This was an action of *assumpsit* tried at the Albany circuit in October, 1838, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

The plaintiff claimed to recover against the defendant as the endorser of a promissory note, dated 13th March, 1832, for \$1000, made by one J. Jackson, which had been negotiated by S. Dutcher to the plaintiff. The defence set up to a recovery was, that the note for \$1000 had been received by Dutcher, to enable him among other things to take up a note for \$763, which it was alleged on the part of the defendant was *usurious*, and that the note for \$1000 had been negotiated to the plaintiff, under such circumstances that the defence of usury was available against him. In proof of the usury, it was shown that Dutcher having lent \$250 to Jackson, the latter brought to him the note for \$763, drawn by one Holdridge, payable to Jackson, endorsed by him and a firm of livery stable keepers, and desired Dutcher to procure the same to be discounted. Dutcher took the note to a bank, and was there told if he would endorse it, it would be discounted; he accordingly endorsed it and received the avails, which he applied by appropriating \$250, to refund himself for the money lent Jackson, \$30 for his endorsement and the trouble he had in the matter, and the residue he paid to Jackson. His own account of the affair is—"I took out \$250 which belonged to me, then I took \$30 for my trouble and for endorsing—I do not endorse for nothing." And again, "I told Jackson I charged \$10 for going to Norton (the president of the bank) to get the note dis-

Steele v. Whipple.

counted, \$10 for having used my name upon the note and \$10 for the bother I had about the \$250, and he took the balance contentedly." There was evidence given on the part of the defendant, for the purpose of showing that the note for \$1000 had been diverted in its appropriation by Jackson from the purpose for which it was made, the defendant being a mere accommodation endorser, and that the plaintiff was not a *bona fide* holder. The judge submitted the questions of whether there was *usury* in the transaction, whether there had been a misappropriation of the note, and whether the plaintiff was a *bona fide* holder, to the jury, who found a verdict in favor of the plaintiff, for \$1444 and 83 cents. The defendant asks for a new trial.

J. McKown, for the defendant.

S. Stevens, for the plaintiff.

By the Court, COWEN, J. The question whether the plaintiff was a *bona fide* holder, and whether the note in question had been used by Jackson for a purpose substantially different from what the defendant intended, when he endorsed, was, we think, properly left to the jury. But whether it was void for usury in the hands of Mr. Dutcher, we think, should not have been left to them. The short of Mr. Dutcher's account is, that he drew the money from the bank on the credit of his endorsement, retained \$250 due him from Jackson, with \$30 in the name of payment for traveling some rods to see Norton, and for endorsing and for trouble. I will only say that if this were not a usurious loan, it is very difficult to conceive what the law would esteem such, short of the party making a direct loan on express usury. If one man give his acceptance or note for another, on an agreement for a compensation, it has long been settled that this is usury *per se*. In one case an acceptance by persons not bankers, under an agreement for a commission of 2½ per cent, was held by Lord Ellenborough to be a transaction on which the jury were bound to find usury. *Kent v. Lowen*, 1 Camp. 177. He said it was a

Steele v. Whipple.

mere cloak for usury. See *Matthews q. t. v. Griffiths*, Peake N. P. C. 200 : and *Jones v. Davison*, Holt's N. P. Cas. 256. I have no hesitation in saying that a man can no more lend his endorsement for a compensation beyond 7 per cent. than his money. Though it is not cash itself, it is an equivalent. The borrower of the endorsement is bound to indemnify the endorser to the extent of the principal and interest which he shall be compelled to pay. All beyond is usury, so far at least as it is a mere compensation for a loan of credit. A bank does no more than lend its notes; yet it can take no more than 7 per cent. Shall it be entitled to more because it chooses to put its bills in the form of an endorsement? The toleration of such a practice as that before us would be a repeal of the statute of usury. A man might always take what per cent. he pleased, if, instead of loaning his money, he loaned his credit. He has only to keep the money in his pocket, and give his acceptance, his note or his endorsement. It would have been the same thing had Mr. Ducher given his check, and charged \$30 for the trouble of drawing it. To prevent evasion, our statute is express that no more than 7 per cent. shall be taken for the loan of money, &c. or a chose in action. 1 R. S. 760, § 2, 2d ed. 3 id. 611, note.

It is true, that a compensation for expense and trouble, e. g. some small and regular commission for bills drawn by one banker on another, has been allowed; that is to say, it has been put to the jury to say whether it was a mere allowance for trouble in the regular course of mercantile business, and not for a loan of credit; and verdicts finding that it was so, have been sustained, though the evidence tended strongly to prove usury. *Hammett v. Yea*, 1 Bos. & Pull. 144. "Surely," said Eyre, Ch. J., "there is a great difference between transactions with bankers and the ordinary transactions between man and man." He said the transaction was equivalent, first, to a discount of the bills; and, second, the bills being drawn on London, it was equivalent to a separate agreement to remit the money so advanced on discount, to London. He added, bankers had a credit in London which was maintained at no small expense.

Steele v. Whipple.

And to this principle all the cases are narrowed. *Carstairs v. Stein*, 4 Maule & Selw. 192. *Masterman v. Cowrie*, 3 Camp. 488. It may apply equally to bill brokers. *Ex parte Henson*, 1 Madd. R. 112. *Ex parte Goss*, 2 Deac. & Chit. 240. But it is confined to these, or at most extends to others acting in the regular course of trade. The reason of its being allowed in those cases, may be collected from the books I have cited. This is going quite far enough. *Bona fide* expense and trouble actually incurred, it is said in one case, may be paid on a loan beside interest, though the lender be not engaged in trade. *Ex parte Gwyn*, 2 Deac. & Chit. 12. But if this be so, none is actually shown in the case at bar. The money was procured by the endorser, and withheld till the borrower came to his terms.

Counsel are certainly right, when they say here was no usury in Mr. Norton or the bank. Had the original note, rested there, or in the hands of a *bona fide* transferee of the bank, and either had brought an action on the original note, or a substituted one, such action would lie. *Barretto v. Snowden*, 5 Wendell, 181, was that case. So was *Coster v. Dilworth*, 8 Cowen, 299, and *Dagnall v. Wigley*, 11 East, 43. The reason of all these cases was, that the agent was the usurer, and not the man who advanced the money and took the note. When the agent holds the note and sues, the case is a very different one. Here the agent Mr. Dutcher, gets the money, hands it over, receiving the \$30, and afterwards takes the note. The whole \$30 was charged for merely lending his name. I do not deny that he might have charged for actual labor, e. g. the ordinary price for drawing a mortgage or bond, as a counter security, or the like. So, had he actually journeyed in procuring the money, and thus incurred expenses, perhaps *Ex parte Gwyn* would allow a reimbursement, if we are to follow that case. But I deny that the case at bar can be put in any other light than a loan of credit, in lieu of money. To allow this, would, so far from discouraging, be to offer a premium for usury. It would place usurious dealing on the most easy terms. A man may keep his cash to lend out at his leisure, and draw interest on his name. His latitudinary charges for the use

Steele v. Whipple.

of the latter would be clear gain ; and an endorser of high credit might make very great profits.

It was as an indemnity or security for such a transaction that the note in question was received by Mr. Dutcher. Its avails were made to cover the money before advanced with the usurious charges, and a further advance of \$200, &c. For these purposes, Mr Dutcher received and considered the note as his own. The substituted note was, of course, equally usurious in his hands with the original transaction ; and so the jury should have been told. *Reed v. Smith*, 9 Cowen, 647.

The learned judge charged, that " If they found from the evidence that the note in Dutcher's hands was usurious," the further inquiry remained as to the plaintiff's being a *bona fide* holder, &c. Whereas, we think the minds of the jury should have been disembarrassed of the first question, by being told that the note was clearly usurious in Dutcher's hands. There can be no doubt that he was fully aware of the consequences to himself, had he continued to hold this note in his original capacity, and sued it in his own name ; and the single question for the jury was, whether the circumstances under which it was transferred to the plaintiff, conferred on him a paramount right under the law as it stood at the time of the transfer. As the case is presented to us, we cannot see whether the jury have found that there was no usury, or that the plaintiff was a *bona fide* holder, or both ; and for the purpose of removing the difficulty, we think there must be a new trial ; the costs to abide the event.

Newcomb v. Raynor.

NEWCOMB vs. RAYNOR and others.

Where there are three consecutive endorsers to a promissory note, the release by the plaintiff of the *first endorser*, is a bar to an action against the *second and third endorsers*.

RELEASE of parties. The plaintiff declared in assumpsit on the money counts against *Richard Raynor, Willett Raynor* and *Josiah Wright*, attaching to the declaration a copy of a promissory note, with notice that the same would be given in evidence under the money counts *according to the statute*. The note, of which a copy was given, purported to be made by *Richard Raynor* for \$500, payable to *Charles Goings* or order, and endorsed by the *payee*, and by *Willett Raynor* and *Josiah Wright*. The defendants pleaded the *general issue*, and the cause was noticed for trial. At the circuit *Willett Raynor* and *Josiah Wright* interposed a plea of *puis darrein continuance*, that on, &c. at, &c. the plaintiff by a *release* under *seal* discharged *Charles Goings* from all liability as endorser of the note. Wherefore they prayed judgment if the plaintiff ought *further* to have or maintain his action, &c. To this plea the plaintiff *demurred*.

B. Davis Naxen, for the plaintiff.

M. T. Reynolds, for the defendants.

By the Court, NELSON, Ch. J. I am of opinion the plea constitutes a good bar to the action. As between the *first* and *subsequent* endorsers, the former must be regarded in the light of *principal*; he stands behind them upon the paper, and is bound to take it up, in case of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties,) on general principles, operates to release them.

It is said their rights are not prejudiced, as they may still resort to an action against him if subjected to the payment

Fort v. Collins.

of the note, as the release leaves the implied contract existing between the *first* and *subsequent* endorsers unimpaired. Conceding this to be so, to permit a recovery against the defendants would but lead to an unnecessary circuitry of action. The plea shows a discharge for a presumed good consideration (as it is under seal) of the first endorser, and it cannot be doubted as the case stands, that if the defendants should be obliged to call upon him, the plaintiff would be bound to take his place. The case, therefore, comes within the familiar rule, that a release of the principal operates to discharge the surety.

It is further said, that Goings may not have been legally charged as an endorser. If this were so, the plaintiff should have replied the fact, as we will not presume it in the face of the acts of both him and the plaintiff to the contrary. The release would not have been necessary on such a supposition.

Judgment for defendants on demurrer; leave to amend on usual terms.

FORT vs. COLLINS.

A *nonsuit* granted after evidence given on *both sides*, will not be set aside for that cause alone.

In this case, a motion was made on the part of the plaintiff to set aside a *nonsuit* granted at the circuit. The motion was made on various grounds, and among others, for that the nonsuit was ordered by the judge *after evidence had been given on both sides*. The Court said that the *modern practice* sanctioned the course which had been pursued at the circuit, and therefore they refused to set aside the nonsuit.

 Buckbee v. Brown.

BUCKBEE vs. BROWN.

A *wharfinger* or *dock master* cannot maintain an action, in his own name, for the recovery of money due for dockage or wharfage, from the owner of a vessel frequenting the port of which he is wharfinger, although by the ordinances and statutes under which he acts the dockage and wharfage is directed to be paid to him, and he is required to collect the same.

Remedies must be pursued in the name of the party in interest, and not in the name of the agent who made the contract, or whose duty it is to make the collection of moneys accruing under such contract. It is otherwise as to *bailees*; in whose names, in many cases, actions may be maintained. In an action for dockage and wharfage of a public port, the defendant by way of *recoupment* may show that the port and wharves, during the accruing of toll, were out of repair, whereby he sustained damage, &c.

ERROR from the Albany mayor's court. *Brown* brought an action of *debt* against *Buckbee* for \$61 70, the *dockage* and *wharfage* of a sloop of which the defendant was the owner and master, claimed by the plaintiff as *dock master* of the port of Albany. The plaintiff in his declaration set forth an ordinance of the corporation fixing the rates of dockage and wharfage, and upon vessels coming to or lying at or within the docks, wharves or slips of the port, and directing the same to be paid to the dock master. He also set forth an act of the legislature, passed 5th April, 1823, authorizing the construction of a *mole* or *pier* opposite the docks fronting the Hudson river so as to form a basin, fixing the rates of *wharfage* to be paid by the owners or masters of vessels entering the basin; and directing the same to be collected by the wharfinger or dock master, in the manner then prescribed by law, and after deducting such sum as should be agreed upon for his services, to pay over one half of the residue to the proprietors of the pier. He then averred that he was duly appointed dock master in 1823, and has ever since continued to hold such office; that at divers days and times between 1st January, 1836, and 31st December, 1837, the sloop *Ambrose Spencer Townsend*, of which the defendant was the owner and master, came to and laid at or within the said docks, wharves or slips, and was liable to pay dockage and

Buckbee v. Brown.

wharfage. By means whereof the defendant *became liable to pay to the plaintiff, as such dock-master* several large sums of money, amounting in the whole to \$61 70, for two years' dockage add wharfage of the said sloop, whereby an action had *accrued to the plaintiff, &c.* The declaration contained also a more general count, and an *insimul computasset*. The defendant pleaded the general issue, and subjoined a notice of special matter to be given in evidence on the trial. On the trial of the cause, the act of the legislature and the ordinance of the corporation were read in evidence, and an admission of the defendant was proved, that there was due from him *to the plaintiff, as dock master*, the sum claimed for wharfage and dockage, if any thing was due to the plaintiff; but that he and others had determined not to pay, as they intended to raise a legal objection. It was admitted that during the years 1836 and 1837 the plaintiff was *dock master*. The defendant's counsel insisted that the plaintiff was not entitled to maintain an action *in his own name* for the dockage and wharfage; which objection was overruled by the recorder. The defendant then offered to prove, in pursuance of his notice, that during the years 1836 and 1837, the *basin* was so filled up that a vessel could not pass through it so as to unlade at the wharves on the main shore but with great difficulty and delay, and that his vessel was in that way greatly impeded and delayed; and also that he was bound to deliver his cargoes at the wharves on the main shore, and that the state of the wharves was such that his vessel could not be unloaded thereat, without erecting a temporary dock or platform for that purpose: this evidence being objected to, was excluded by the recorder, and the jury, under his direction, found a verdict for the plaintiff for \$67 49, on which judgment was entered. The defendant having excepted to the decisions of the recorder, sued out a writ of error.

S. Stevens, for the plaintiff in error.

A. Taber, for the defendant in error.

Buckbee v. Brown.

By the Court, COWEN, J. Independent of the statute direction, that the dock master, &c. shall collect, the exclusive legal interest, if not in the docks and wharves in question, at least in the tolls arising from their occupation, would reside in the corporation of Albany, and the remedy for collection could be only in the name of the corporation. The relation between the corporation and occupant is precisely that of landlord and tenant, the latter entering under and being estopped to question their interest. The wharfage and dockage are a rent, for which the law allows the same concurrent remedies, by action and distress, as in the common case of landlord and tenant. *Bradby on Distresses*, 191, 193, and the cases there cited. Remedies, whether by action or distress, must be pursued in the name of the party in interest, and not in the name of the agent who made the contract or one who is appointed to make the collection or do both. The agent stands in the name and place of the principal, and in legal effect it is the same as if the principal had acted throughout in person. *Ham. on Parties*, 4, 29. 1 Chit. Pl. 2, 3, ed. of 1828.

The general doctrine is extremely well settled; and *Piggot v. Thompson*, 3 Bos. & Pull. 147, furnishes an illustration quite apposite in its circumstances, and we think precisely so in its principle. Commissioners were appointed by act of parliament, to drain certain fen lands, in whom and their successors certain tolls were vested. The commissioners let the tolls to the defendant for three years, by a written agreement, whereby he acknowledged to have hired the tolls at so much per annum, "to be paid to the treasurer of the commissioners at his house in Ely." The treasurer was appointed pursuant to the act of parliament, with an annual salary. The plaintiff held the office, and the defendant continued to receive the tolls, and made partial payments of the rent to the plaintiff during the three years; and the action was brought for the balance. It was held that the action would not lie. Eyre, Ch. J. said the instrument did not operate as a promise to pay the treasurer for the time being, as the counsel for the plaintiff had supposed. If the plaintiff had been removed from office, a pay-

Buckbee v. Brown.

ment to him would not have availed the defendant. The manifest intention of the agreement was, that the defendant should pay the money to any person whom the commissioners should choose to make their treasurer for the time being; but by law a debt is not so assignable." Heath, J. said, "It appears to me that the appointment to pay the treasurer, was meant for the benefit of the commissioners; and they alone can sustain the action." -Rooke, J. said, "I think the contract was made with the commissioners." Chambre, J. said, "The contract is to pay the commissioners through the medium of their officer." The same principles, in a case quite similar, were acted upon by the exchequer chamber in *Bowen v. Morris*, 2 Taunt. 374.

In the case at bar, the city corporation must be taken to have been the proprietor of the ground which the defendant occupied, the contract was made with their dock master, and the rent payable to him. So far this case is precisely parallel with *Piggot v. Thompson*. The declaration in the statute that the toll "shall be collected by the wharfinger or dock master, in the manner now prescribed by law," certainly meant no more than an express stipulation in writing would, to pay to one of those agents. Suppose he had been removed, payment might have been made to his successor, or any other agent appointed by the corporation to receive it. In short, the dock master or wharfinger, or other person so appointed, would be the naked agent to contract, receive and pay over-as directed by the statute. It would be a most singular anomaly were the promise or right of action to run from one agent to another, upon the mere declaration of the statute recognizing such a power to collect as the corporation might themselves have conferred, and such as they had probably been in the habit of conferring on some agent. To that probably the statute refers. He is to collect as he may now do by law. The statute could mean no more than that he might collect as agent, unless he had been before armed with some peculiar power. Nothing of that kind appears. The legislature might, by a very short clause, have conferred power to sue in his own name as they frequently do in express terms on over-

Buckbee v. Brown.

seers of the poor and others. But they have not done it. They have avoided the ordinary words used to confer such an artificial remedy.

But the counsel for the defendant in error seeks to distinguish the case by the provision that, after collection, the agent shall deduct the amount of his compensation as agreed on between him and the corporation, and pay one half the balance to the pier proprietors, and one half to the corporation. It is supposed that this raises such an interest by way of trust and lien for wages upon the fund, as takes the case out of the general rule. I do not collect from the bill of exceptions that any sum had been agreed on to be taken from the fund in the hands of the plaintiff below. But if otherwise, that was but a mode of compensation, which the corporation might have revoked by his removal; and made payment to him in another form, if any money had been due. Nor was the mere direction to pay over, any thing beyond what the agent might have done without. It was but another form of declaring that the pier proprietors, in consideration of the value which their pier had superadded to the city docks and wharves, should have one half the toll which had been doubled in consequence. The authority to pay over in the mode mentioned, would have resulted from the declaration of the same right in any other form. The agent who might get the money would but be doing justice by such an act; and should he pay the whole to his principal, the corporation, the latter would be liable to an action for the shares of the pier owners, if withheld on demand. The statute was but directory as to the mode of doing the business by the agent. It raised in him no greater interest, and no trust beyond what would have resulted from the legal character of his agency, independent of the statute.

It is not necessary to deny that an *express contract* to pay A. for the use of B. on a consideration moving from B., will raise such a legal interest by way of trust as will maintain an action in A.'s name, though even that has been doubted, as will be seen by what Eyre, Ch. J. said in *Piggot v. Thompson*. Nor is it necessary to deny the right of

Buckbee v. Brown.

factors, commission merchants, carriers, auctioneers, masters of vessels, &c., to maintain actions either for tortiously interfering with their possession, or to recover prices, or for moneys falling due to them in various ways in respect to their interest, duties, liens or liabilities. They are bailees, and have a special property. Their right to sue in their own names will be found to arise mainly out of their legal interest. They are not naked agents. A factor or broker selling goods under a *del credere* commission, is a *quasi* owner. Neither the principal nor purchaser ordinarily thinks of looking beyond him. *Morris v. Cleasby*, 1 Maul. & Selw. 576, 580. *Sadler v. Leigh*, 4 Camp. 195. An auctioneer sold the goods on the premises of his principal; the purchaser by a trick got them away without payment. The auctioneer paid the price to his principal, and sued the purchaser in his own name for goods sold, and the action was held to lie. Lord Loughborough gave the reason, "that an auctioneer has a possession coupled with an interest in goods which he is employed to sell; not a bare custody like a servant or shop-man." Heath, J. added, if they should be stolen he might maintain trespass. Wilson, J. added another ground, that of estoppel; the defendant having bought of the plaintiff who had the custody, should not gainsay his right to recover as vendor. *Williams v. Millington*, 1 H. Bl. R. 81. See also *Coppin v. Walker*, 2 Marsh. 497, 500, 1. 7 Taunt. 237, 240, S. C. Similar reasons will be found to run through those cases where actions have been sustained by the various bailees I have mentioned. A master has a special property in the vessel, and may, therefore, declare for the freight of goods as carried in *his* vessel, though he be not the owner. *Shields v. Davis*, 6 Taunt. 65. Another instance is *Atkyns v. Amber*, 2 Esp. R. 493, to which the counsel for the defendant in error especially referred us on the argument. Indeed the plaintiff there was a pledgee of the goods, which he had sold as such, and was suing for the price. See *Brown v. Hodgson*, 4 Taunt. 188, as to a carrier. A broker in a matter of insurance, especially if he act under a *del credere* commission, is also regarded as principal, and may sue or be sued

Buckbee v. Brown.

in his own name. *Grove v. Dubois*, 1 T. R. 112. This case is treated by a learned writer as an exception implied from the course of trade. *Ham. on Parties*, 11. If they have no commission *del credere*, they may maintain an action in respect to their lien, if the contract be made in their own names, though on account of their principals. *Parker v. Beasley*, 2 Maul. & Selw. 423. In this case they claimed by virtue of a policy running to them, by name, on account of their principals. Bayley, J. said, that "by suffering their names to be inserted in the policies, the underwriter has agreed that they shall be considered as principals, *if they have an interest.*"

On the whole, it is enough to see that the case before us has not been brought within any of the peculiar reasons on which exceptions to the general rule have been allowed. To sustain this action would be to authorize a suit in the name of any ordinary agent for the management of an estate, instead of requiring it to be brought in the name of the proprietor. It makes no difference that part of the accruing rents are, when collected, to be paid over to another. This is not an assignment of so much. The corporation must sue or distrain in its own name, accounting through its agents to the pier owners. It holds the entire legal estate in the tolls; one half in its own right, and the other as a trustee for the pier owners, after defraying the immediate expenses of the management and collection.

An ulterior point has been made, and arises on the bill of exceptions, which we need not consider particularly, because the judgment must be reversed on the mistake of the name. Looking at what was offered in the court below, and taking it for true, it seems that the corporation are claiming full toll without keeping the docks in repair. It can hardly be that the statute intended so unreasonable a thing as that a man should pay full dockage by the season, without the docks being kept in good condition. "The owners of a public port are of common right bound to keep it in repair, for the neglect of which they are liable to an indictment." *Bradby on Distresses*, 191. They are under an implied obligation to repair, and this is a consideration

Bennett v. Earll.

for the toll. *Id.* The corporation laboring under such obligation in respect to their docks, would doubtless be liable for special damage, arising to individuals from its violation; and there cannot be any good reason, that I see, against recoupment in an action for the rent to the extent of such damage. The offer of proof also extended to foulness of the basin, which very likely was well founded, from what I heard of it in April, 1837, upon a dispute between the state and the pier owners. *Ex parte Smith*, 18 Wendell, 659. I felt very little doubt then, and feel very little now, that the corporation are bound to keep the basin in repair, with the exception of certain specific parts assigned by statute to the pier company, which were noticed in that case; and see *Alb. Corp. v. The People*, 11 Wendell, 539, Nelson, J.

The judgment of the mayor's court, however, must be reversed on the first point; *venire de novo* from court below.

BENNETT vs. EARLL.

A bill of sale of personal property, when possession does not accompany the transfer, has no preference over a mortgage of the same property subsequently executed, although that also be unaccompanied by a change of possession. The mortgage being *bona fide*, holds the property in preference to the bill of sale; a change of possession in respect to it being important only as it regards creditors and subsequent purchasers.

ERROR from the Onondaga common pleas. Bennett sued Earll in *trover*, for the conversion of certain personal property. The plaintiff's claim was founded upon a mortgage executed to him on the *twenty-fourth* day of *August*, 1836, to secure the payment of a sum of money on the first day of *September* ensuing the date of the mortgage. The defendant set up a claim to the same property under a bill of sale executed to him on the *fifteenth* day of *August*, nine days *preceding* the date of the mortgage. Possession of the property did not accompany either the bill of sale or the mortgage, the former owners continuing to use it until *October*, 1836, when the defendant took possession thereof,

Bennett v. Earl.

and carried it away. The court charged the jury that both the plaintiff and defendant being in default in not taking possession of the property at the time of the execution of the instruments, and the defendant having been the first in taking possession, was entitled to the property, as the most vigilant of the two creditors. The jury found for the defendant. The plaintiff having excepted to the charge of the court, sued out a writ of error.

J. A. Spencer, for the plaintiff.

B. Davis Noron for the defendant.

By the Court, NELSON, Ch. J. The charge of the court that as both parties were in fault in not taking possession of the property at the time of the execution of the instruments, the defendant was entitled to *priority*, as the most vigilant, was erroneous. The statute, 2 R. S. 136, § 5, made the *bill of sale* absolutely fraudulent as against "subsequent purchasers in good faith;" which term includes the *mortgagee*, he being a purchaser *sub modo*, unless the continued possession by the vendor was sufficiently explained, which is not pretended to have been done here. As regards this *prior sale*, then, the mortgagee was not under the necessity of taking possession of the property, this being only important in respect to *creditors* and *subsequent purchasers*. It is enough in such cases, that the transaction be *bona fide*. *Gregory v. Thomas*, 20 Wendell, 17.

Judgment reversed; *venire de novo*.

The Herkimer County Bank v. Cox.

THE HERKIMER COUNTY BANK *vs.* Cox and others.

In an action by a *bank* against the *endorsers* of a promissory note, the certificate of the notary of the bank, if *he be a stockholder*, is not admissible in evidence to prove presentment, protest and notice.

THIS was an action of *assumpsit*, tried at the Herkimer circuit in May, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

The action was against the defendants as *endorsers* of a promissory note. For the purpose of proving a presentment for payment, protest for non-payment, and notice to the endorsers, the plaintiffs offered in evidence the certificate of *Albert G. Story*, a notary public, who at the time the protest bears date, was the cashier and a *stockholder* of the bank. The defendants objected to the certificate on the ground that the notary was interested at the time the certificate was made. The judge overruled the objection, and the defendants excepted. The jury found for the plaintiffs. The defendants ask for a new trial.

M. T. Reynolds, for defendants.

D. Burwell, for plaintiff.

By the Court, BRONSON, J. Although the language of the statute is general, that the certificate of a notary shall be presumptive evidence of the facts contained in it, Stat. Sess. of 1833, p. 395, § 8, I think it should not be so construed as to admit the certificate in a case where the notary, by reason of interest, would be an incompetent witness.* The legislature did not intend to dispense with the necessity of proving a demand and notice, for the purpose of charg-

*The section referred to, is as follows: "In all actions at law, the certificate of a notary under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice,

Beddoe's ex'r v. Wadsworth.

ing an endorser, but only to change the mode of proof. The statute has rendered it unnecessary to call the notary, by giving the same effect to certain facts set forth in his official certificate, as though he had appeared in court, and sworn to those facts. I cannot think that the legislature intended to sanction this secondary evidence in a case where the officer was an incompetent witness at the time he made the certificate. The same question has arisen in Pennsylvania, *Bank v. Porter*, 2 Watts, 141, and the certificate was rejected.

New trial granted.

BEDDOE'S EXECUTOR vs. WADSWORTH.

An assignee of covenants of warranty and for quiet enjoyment, may maintain an action on the covenants where *possession* is taken under the deed and there is a subsequent eviction, although at the time of the execution of the deed the grantor had no title.

The covenants may be assigned as well by a *release* and *quit-claim* as by *deed of bargain and sale*, or by *lease and release*.

The damages recoverable upon a breach of covenant of warranty or for quiet enjoyment, belong to the *personal representative* and not to the *heirs* of the party evicted.

Where the eviction takes place during the life of the *assignee* and the damages and costs are paid *in part* by him, and *in part* by his *executor* after his death, the facts may be alleged according to the truth of the case, in an action by the executor.

To support an action for breach of covenants of warranty and for quiet enjoyment, an *eviction by title paramount* must be alleged and proved.

DEMURRER to declaration. This was an action on covenants of warranty and for quiet enjoyment, contained in a deed of land, dated July 7th, 1797, executed by the defendant to *John Johnston*. Each count (there being six in all) averred that afterwards, viz. on

and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate ; but this section shall not apply to any case in which the defendant shall annex to his plea an affidavit denying the fact of having received notice of non-acceptance or of non-payment of such note or bill."

 Beddoe's ex'r v. Wadsworth.

the same day, the defendant by Johnston's direction, and with his consent, surrendered *possession* of the land to the testator, John Beddoe, who *continued in possession* until Johnston, on the 16th August, 1802, by indenture, in consideration of *one dollar*, therein expressed as in hand paid by Beddoe, did "remise, release, and forever quit claim unto the said John Beddoe, his heirs and assigns forever, all the right, title, interest, claim or demand, which the said John Johnston, &c. had in or to the said tract, &c. to have and to hold the said tract, &c. unto the said John Beddoe, his heirs and assigns forever, to his and their own proper use, benefit and behoof, &c." Each count stated an eviction, from part of the premises, while in possession of persons claiming under John Beddoe, the plaintiff's testator, and during the lifetime of the testator. The eviction was alleged to have been in virtue of a title in one Rachel Malin. All the counts except the sixth stated this title to be paramount to the defendant's; and all except the *fifth* averred that the plaintiff, *as executor*, had thereby incurred damages and costs. The *fifth* count averred that the *testator* in his lifetime, and the *plaintiff* since his death, had been obliged to pay them.

The *first* and *second* counts averred that the defendant's deed to Johnston was given to and received by Johnston for and in behalf of Beddoe, the testator, and for his benefit.

All the counts except the third, concluded as for a breach of the covenant for *quiet enjoyment* only; the third was for a breach of the covenant of *warranty* only. But the deed as set forth in each count in fact contained covenants of seisin, of warranty, for quiet enjoyment, and further assurance. The defendant *demurred* to each count.

The demurrers were argued by

J. C. Spencer, for the defendant.

D. B. Prosser, for the plaintiff.

Points made and argued on the part of the defendant;

1. It appears by all the counts in the declaration except the sixth, that the *defendant* never had any title to the pre-

 Beddoe's ex'r v. Wadsworth.

mises from which the evictions were had ; consequently *no title* passed by his deed to *Johnston*, and none was or could be conveyed by *Johnston* to *Beddoe*, and as *no estate* passed to *Beddoe* there was no land to which the *covenants* declared upon, could be annexed so as to pass to the *assignee* of *Johnston*. In support of this point the counsel cited and commented upon the following authorities : 4 Kent's Comm. 471, note *b* ; *Hickford v. Page*, 2 Mass. R. 455, 560 ; *Andrews v. Pearce*, 1 Bos. & Pull. N. R. 158 ; *Marston v. Hobbs*, 2 Mass. R. 439 ; *Wheelock v. Thayer*, 16 Pick. 68, 70 ; *Bartholemew v. Cander*, 14 Pick. 167, 171 ; *Wade v. Merwin*, 11 Pick. 287 ; *Copenhurst v. Copenhurst*, T. Raym. 27 ; *Pitcher v. Livingston*, 4 Johns. R. 1 to 10 ; *Hamilton v. Wilson*, id. 72 ; *Greenley & others v. Wilcox*, 1 Johns. R. 8 ; *Bailey v. Wells*, 3 Wils. 29 ; *Webb v. Russell*, 3 T. R. 402 ; *Walker's case*, 3 Co. R. 23 ; *Spencer's case*, 5 Co. R. 18 ; Viner's Abr. tit. Covenant K. 7.

II. The *release* and *quit-claim* from *Johnston* to *Beddoe* was not an *assignment of the covenants* contained in the deed of the defendant to *Johnston*. 4 Cruise's Dig. 97 to 99, tit. 32 Deed, ch. 6. & 25 ; *Butler v. Duckmanton*, Cro. Jac. 169 ; *Noke v. Auder*, Cro. Eliz. 436 ; *Bennett v. Irwin*, 3 Johns. R. 363 to 366.

III. The *covenants* on which the action is brought, being such as would run with the land, the action should have been brought by the *heir* and not by the *executor*, there being no averment that the personal estate had been legally *damnified*. *Hamilton v. Willson*, 4 Johns. R. 72, *Kingdorn v. Nottle*, 1 Maule & Sel. 355. *Lacy v. Livingston*, 2 Lev. 66, and 1 Vent. 175. *King v. Jones*, 5 Taunt. 318.

IV. The *fifth* count alleges that both the *testator* and the *executor* paid the damages and costs on the eviction of the grantee of the testator.

V. The *sixth* count does not allege a disturbance of possession by any title *hostile*, or inconsistent with that of the defendant.

By the Court, COWEN, J. If the *covenants of warranty* and for quiet enjoyment passed by the *quit-claim* deed from *Johnston* to the plaintiff's testator, the right of action sought

Beddoe's ex'r v. Wadsworth.

to be shown by the declaration seems to be clear in all the counts except the sixth. This count is defective in not averring that the eviction was by a title paramount to that of the defendant. *Webb v. Alexander*, 7 Wendell, 281. *Luddington v. Pulver*, 6 id. 404 to 406. *Greenby v. Wilcocks*, 2 Johns. R. 395. *Ellis v. Welch*, 6 Mass. Rep. 246. Per Savage, Ch. J. in *Rickert v. Snyder*, 9 Wendell, 421, 422. 4 Kent's Comm. 479, 3d ed. 'Non constat but Rachel Malin may have proceeded to eviction upon a right derived from Johnston or the testator himself. In the other five counts, however, there is enough to show that during the lifetime of Beddoe the testator, he either became personally liable on covenants to his grantees as to a part of the premises from which they were evicted by a title superior to the defendants, or suffered an injury in an eviction of his tenant by a like superior title. Then it is averred either that the plaintiff was compelled to pay damages and costs as executor, or, according to the fifth count, the testator in his lifetime was obliged to pay a part, and the plaintiff another part after his death. In either case, the right of action pertained to the testator personally. The covenant was broken by the eviction, and the whole damages were due, Hosmer, Ch. J., in *Mitchell v. Warner*, 5 Conn. R. 504 to 506, the right to which passed on his death, not to his heir, but to his personal representative. *Hamilton v. Wilson*, 4 Johns. R. 72. A covenant real ceases to be such when broken, and no longer runs with the land. It would not go to the heir by death for the same reason that it could no longer follow the land into the hands of a devisee or grantee. See *Markland v. Crump*, 1 Dey. & Bat. 94, 101; *Kingdorn v. Nottle*, 1 Maule & Sel. 355; 4 id. 53, S. C.

This view of the case disposes of all the minor objections raised by the demurrers. There must be judgment for the defendant on the sixth count, and for the plaintiff on all the others, unless either the first or second point taken by the defendant's counsel is sustainable. These are each applicable to the remaining five counts.

The first point is, that it appears from five of the counts, that when the defendant conveyed to Johnston, he, the de-

Beddoe's ex'r v. Wadsworth.

fendant had no title; and as no estate therefore passed to the plaintiff's testator, the covenants were not assigned; that covenants pass only as *incidents* to an estate; and if there be none, the covenants cannot be said to be annexed to an estate, much less to pass with it. The point seems to suppose that these covenants can never be transferred where there is a total want of right in the original covenantor, though his deed transfer the actual possession. It seizes on the phrase in 4 Kent's Comm. 471, note b, 3d ed., and other books, "that they cannot be separated from the land and transferred without, but they go with the land as being *annexed to the estate*, and bind the parties in respect to *privity of estate*." No New York case was produced which denies that they pass where the *possession* merely goes from one to another by deed, and there is afterwards a total failure of title; but there are several to the contrary. *Withy v. Mumford*, 5 Cowen, 137. *Garlock v. Closs*, 5 id. 143, n. And see *Markland v. Crump*, 4 Dev. & Bat. 94; *Booth v. Starr*, 1 Conn. R. 244, 248. Nor when we take the word *estate* in its most comprehensive meaning, can it be said there is none in such a case to which the covenant may attach. It is said by Blackstone to signify the condition or circumstance in which the owner stands with respect to his property, 2 Black. Comm. 103, and a mere naked possession is an imperfect degree of title which may ripen into a fee by neglect of the real owner. Id. 195, 6. It is, in short, an inchoate ownership or *estate* with which the covenants run to secure it against a title paramount; and in that sense is assignable within the restriction insisted upon. It is said in several cases that the covenants of warranty and quiet enjoyment refer emphatically to the *possession* and not to the *title*. *Waldron v. McCarty*, 3 Johns. R. 471, 3, per Spencer J. *Cortz v. Carpenter*, 5 id. 120. The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure both of possession and title according to the extent of such failure.

The case of *Bartholomew v. Candee*, 4 Pick. 167, was mainly relied upon in support of the ground taken by the first point. All that case decides is, that a covenant no longer runs with the land after it is broken. The declaration was by the grantee of one Thorp, to whom the defendant had conveyed in fee with covenants of seisin and warranty; and breaches were assigned upon both. The defendant pleaded and the jury found, that before the defendant conveyed to Thorp, he had conveyed to one Sparks, who entered and died actually seised, leaving the land to the children, who were still actually seised when the defendant conveyed to Thorp. Mr. Justice Wilde arrives at the conclusion that the covenant of seisin was broken before the deed from Thorp to the plaintiff; and adds—"This point being established, it is perfectly well settled that no action will lie on this contract in the name of the assignee. By the breach of the covenant of *seisin*, an action accrued to the grantee, which being a mere chose in action, was not assignable." He does not notice the covenant of *warranty*, but seems to consider the claim under that as standing on the same ground; which I think might well lie under the pleas as found by the jury. The fair import of these was that neither Thorp nor the plaintiff ever had possession; so that, according to some cases, the covenant of warranty was also immediately broken; *Duvall v. Craig*, 2 Wheat. 45, 61, 62; *Randolph v. Meak*, Mart. & Yerg. 58; and according to our own it never could have any effect. No possession ever having been taken under the deed, there could be no actual eviction, which is said to be essential to a recovery upon a covenant of warranty. *Webb v. Alexander*, 7 Wendell, 281 to 284, and the cases there cited. *Jackson ex dem. Montresor v. Rice*, 3 Wendell, 180, 182, per Savage, Ch. J. *Vanderkarr v. Vanderkarr*, 11 Johns. R. 122. See a very full collection and consideration of the cases to this point, both as it respects the covenant of warranty and for quiet enjoyment, by Hosmer, Ch. J., in *Mitchell v. Warner*, 5 Conn. R. 521 to 527. That an unbroken covenant of warranty shall run with the possession of the land, was not questioned by counsel or court in *Bartholomew v. Candee*, nor was it in

 Beddoo's ex'r v. Wadsworth.

a subsequent and similar case, *Wheelock v. Thayer*, 16 Pick. 68, also relied upon. I have looked through the other cases cited by the counsel for the defendant, and they all go to the point, either that a covenant broken ceases to be assignable, or that covenants in gross are not so. These positions are indisputably settled; and we have adopted the first, in order to show that this action was properly brought by John Beddoo's executor instead of his heir. I do not except from this remark the case of *Andrew v. Pearce*, 4 Bos. & Pull. 158. It is true that was an action on covenants both that the defendants had authority to demise and for quiet enjoyment. The title failed before the plaintiff took an assignment; he entered and was ousted; and it was held that he could not recover, because the mere failure of the title broke the covenants. Mansfield, Ch. J. said expressly, the assignor had only a right of action left, which he could not assign. It would seem by this case that, in England, a simple failure of title, without eviction, would be a breach of the covenant for quiet enjoyment. With us the doctrine is clearly otherwise. *Kortz v. Carpenter*, 5 Johns. R. 120. *Norman v. Wells*, 17 Wendell, 160, and the cases there cited. And see *Mitchell v. Warner*, 5 Conn. R. 498, 522, and the very full reference there to the New York cases. In *Andrew v. Pearce*, the lease was treated as totally gone, by a failure of the title; whereas there was still a continuing possession, till the plaintiff was ousted, and then and not till then, according to our cases, was the covenant for quiet enjoyment broken. There is a difference in more respects than one between our own and the English cases as to what shall constitute a breach of the covenants of title, so as to take away their assignable quality. Even a covenant of seisin, made and broken in the same breath, is there held to run with the land, till actual damages are sustained by the breach. *Kingdorn v. Nottle*, 1 Maule & Sel. 355. 4 id. 53. Kent's Comm. 471, 2, 3d ed. says the reason assigned for the decision is too refined to be sound. The case is followed by *Backus' adm'r v. McCoy*, 3 Ham. Ohio R. 211; but severely criticised in *Mitchell v. Warner*, 5 Conn. R. 497 to 505. Kent's Comm. *ut supra*, note a.

But secondly, if the covenant be in its own nature available to the assignee as a protection against the total failure of the defendant's title, and if it be assignable by a grant of the land, it is insisted that none of the counts in the declaration show that such a grant was made from Johnston to the plaintiff's testator. All the counts stop with averring that Johnston, for the consideration of one dollar, *remised, released and forever quit-claimed* to the testator in fee. Technically, these are but words of release; and as no previous lease from Johnston to the testator is shown, it is supposed that the granting words are inoperative. This objection supposes that the words used cannot carry the estate except as part of a conveyance by lease and release; and that, in order to give them effect, a lease should be shown, either by its production and proof, in the usual way, or its recital in the release; and this formal strictness would seem still to prevail in England. *Doe ex dem. Pember v. Wagstaff*, 7 Carr. & Payne, 477. In *Bennett v. Irwin*, 3 Johns. R. 365, 366, Van Ness, J. said, a mere release or quit-claim, unless the releasee is in possession, is void. But the declaration, in the case at bar, shows that the grantee was in possession. Even this strictness was, however, totally exploded, by the case of *Jackson ex dem. Salisbury v. Fish*, 10 Johns. R. 456, the operative words as set forth in the declaration being held of themselves sufficient to raise and execute a use under the statute. The conveyance was there held good as a bargain and sale. Had that case occurred to counsel, we should doubtless have been saved the examination of this objection; for we do not remember its being denied on the argument that words which are sufficient to pass a fee in conveyancing are equally sufficient in pleading by way of averment.

The demurrers are overruled as to all the counts except the sixth, and judgment must be given for the plaintiff.

The demurrer to the sixth count is well taken, and judgment must be given for the defendant as to that count, with leave to both parties to amend.

The People v. Irvin.

THE PEOPLE vs. IRVIN.

The *nephew* of a person dying intestate and seised of an estate of inheritance, although a *naturalized citizen* is not capable of inheriting the estate, if his father be an *alien* and living at the time of the decease of the person last seised, notwithstanding the provision in the statute of descents, "that no person capable of inheriting, &c. shall be precluded from such inheritance by reason of the *alienism* of any *ancestor* of such person."

Our statute is substantially like the act of 11. and 12 Wm. III, ch. 6, and must receive the same construction, viz. that it does not enable a person to deduce title through an *alien ancestor still living*.

THIS was an action of ejectment tried at the New York circuit, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The premises claimed were alleged to have *escheated* by the death of one *Thomas Irvin* without heirs capable of inheriting. Thomas Irvin, although an *alien* born, had been *duly naturalized*, and was a citizen of the United States. He died intestate the 10th May, 1837, seised in fee of the premises in question. He left no *children* or child, or other lineal descendant, nor was his *father* or *mother* living at the time of his decease; nor had he any *brother* or *sister* except such as were at all times *aliens*. He left at his decease a brother named *William*, then and at the time of the trial of this cause residing in Glasgow, in Scotland, an *alien*. A son of this brother, viz. *Richard Irvin*, the defendant in this cause, has resided in this state for the last 15 years, and was *duly naturalized* 10th December, 1834. He claims as the next of kin capable of inheriting, to be the heir at law of Thomas Irvin, and has accordingly taken possession of the premises. It was conceded on his part, if he was not capable of inheriting, that the property had *escheated*. The jury found a special verdict. This cause was argued at the last October term.

S. Beardsley, (attorney-general) for the people. It is conceded by the defendant that the property in question has *escheated*, unless he was capable of taking by *descent* on the

The People v. Irvin.

decease of his uncle ; and it is insisted on the part of the people that he can not take because he must make title to the premises *through* his father, who is an *alien* and now living. 2 Kent's Comm. 55, 3d ed. ; 9 Wheaton, 354. 7 Wendell, 332. 10 id. 9. The statutory provision that no person capable of inheriting, &c. shall be precluded from such inheritance by reason of the *alienism* of any of his ancestors, 1 R. S. 754, § 22, does not help the defendant ; having been held to be the same in substance as the act of 11 and 12 Wm. III, ch. 6, which does not enable a person to deduce title through an *alien ancestor still living*. See authorities above cited. Under our statute of descents the *brother* of the person last seised would be entitled to the property but for his *alienage*, and during his life the defendant is not capable of inheriting, and therefore is not within the provisions of the statute. The fact of his father being living excludes him. It is only a person capable of inheriting within the provisions of the statute, who is not to be precluded, &c.

D. Lord, jun. & B. F. Butler, for the defendant insisted that by the *sixteenth* section of the statute of descents, which declares that "in all causes not provided for by the preceding rules, the inheritance shall descend according to the course of the common law," as modified by § 22, of the same statute, the defendant was capable of taking, 1 R. S. 753, § 16, and 754, § 22, and that our statute in respect to the *alienism* of the *ancestor* is different from the act of 11 and 12 Wm. III, ch. 6, and should be construed to authorize a descent to the nephew, although his father is an *alien* and still *living*. In support of this last position they cited Yorke on Forfeitures, 76, 87 ; 7 Johns. R. 214 ; 2 Black. Comm. 251 ; 2 Mass. R. 179, n. 2 Leigh's R. 109.

By the Court, NELSON, Ch. J. *William*, the brother of the person last seised, if a citizen and capable of inheriting at the time of the decease of the intestate, would have taken the estate under § 8, of our statute of descents ; and if dead leaving issue, also capable, they would like him have

The People v. Irvin.

taken under the same section. 1 R. S. 752, § 8. 7 Wendell, 336. But he is an *alien* and therefore cannot take, and his uninheritable blood impedes the descent to the naturalized son, the defendant. It is perfectly settled upon all the law, that the nephew does not inherit immediately or personally from the uncle; that he must derive title from the common stock, (the grandfather) through the blood of the father; he stands in the second degree. 2 Black. Comm. 207, 227. 7 Wend. 332, and the cases there cited. 10 id. 9, and 6 Peters, 108.

The only remaining question then is, whether the defendant is brought within the statute, 1 R. S. 754, § 22, ameliorating the law in respect to heirs claiming *through alien ancestors*. It provides, that "no person capable of inheriting under the provisions of this chapter, shall be precluded from such inheritance, by reason of the *alienism* of any ancestor of such person." This section was taken, substantially from the 11 and 12 Wm. 3, ch. 6,* which is understood to apply only to the case of a *deceased*, not of a *living ancestor*; 9 Wheaton, 354; 2 Kent's Comm. 55, 3d ed.; 7 Wend. 339; though I have not been able to find any express adjudication in England on the point.

Judgment for plaintiff.

* The words of the statute of 11 and 12 Wm. III, ch. 6, are "That all and every person or persons, being the king's natural born subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable, as heir or heirs to any honors, manors, lands, tenements or hereditaments, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers or mothers, or other ancestor of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms and dominions, as freely, fully and effectually to all intents and purposes, as if such father or mother, or fathers or mothers, or other ancestor or ancestors, by, from, through or under whom he, she, or they shall or may make or derive their title or pedigree, had been naturalized or natural born subjects."

Whitney v. Lewis.

WHITNEY vs. LEWIS and others.

Where lands were sold and conveyed by deed, containing a covenant for *quiet enjoyment*, and the purchaser executed his bond for the consideration money, it was held, that it is no defence to an action on the bond, that the grantor was not seised in fee and had no right to convey the premises, if there be no allegation of any fraudulent representation on the part of the plaintiff in respect to the title. The above facts showing neither a failure or an original want of consideration.

DEMURRER to declaration. The plaintiff declared in debt on bond dated 4th March, 1836, in the penal sum of \$5000, conditioned for the payment of \$2500, in six equal annual instalments, with interest. The defendants pleaded 1. *Non est factum* ; and, 2. That before the execution and delivery of the bond, to wit, on the said 4th March, 1836, the plaintiff and his wife, by deed of that date, for the consideration of \$2500, did grant, bargain, sell, &c. unto the defendants, their heirs and assigns for ever, a certain piece of land in the village of *Oswego* ; and the plaintiffs, by the deed, covenanted with the defendants, their heirs and assigns, to warrant and defend them in the *quiet and peaceable possession* of the premises, against all and every person lawfully claiming or to claim the whole or any part thereof. That the bond was at the same time executed as a security for the payment of the purchase money ; that the plaintiff was not then and never had been seised in fee of the land, nor had he any right to convey in manner aforesaid ; but that Martin Van Buren then was, and ever since has been, the owner in fee of the land, claiming adversely to the plaintiff. That the plaintiff at the time of executing the deed, well knew that he was not seised in fee of the land, nor had the right to grant the same in manner aforesaid. That the defendants have not received, and are not entitled to an estate *in fee* in the land : nor have they received *any consideration whatever* for the balance remaining due on the bond, but therein the consideration has wholly failed ; and so the defendants say they have been defrauded in manner

 Whitney v. Lewis.

aforesaid. Verification. There was a *third* plea substantially like the second. Demurrer to both pleas, and joinder.

I. Williams, for the plaintiff. The plea in this case, that the plaintiff was not *seised in fee* and *had no right to convey* the land, is no answer to an action of debt on bond for the recovery of the consideration money. The remedy of the defendants, if any, is to resort to the covenants in the deed. 16 Johns. R. 267. 12 id. 442. 13 id. 359. 10 id. 266. The mere knowledge of a grantor that he had not a *perfect* title at the time of the conveyance, in the absence of all fraudulent representations as to the title, does not affect his right to recover the consideration money. 2 Kent's Comm. 471. 2 Johns. Ch. R. 519. 5 Conn. R. 528. 19 Martin's Lou. R. 235. To make the defence good in this case, an *eviction* should have been averred. 2 Johns. Ch. R. 546. 20 Johns. R. 130. 2 id. 177. 17 Wendell, 188.

A. Taber, for the defendants. The consideration of a *bond* in an action upon it in a court of law, is inquirable into to the same extent as is the consideration of a simple contract in an action upon it, 2 R. S. 406, § 77, 11 Wendell, 106, 15 id. 359. The defendant by his plea shows that here is a *total failure of consideration*, 7 Johns. R. 324, 11 id. 50; and if for no other reason, the plea should be sustained, to prevent circuity of action. But there is another reason. The plea avers that the plaintiff *well knew* that he was not seised, and that he had no right to convey, and that they the defendants have not received any consideration, and so they have been *defrauded*, &c.; all which is admitted by the demurrer, and constitutes a perfect defence to the action. 1 Comyn on Cont. 38. 14 Wendell, 195.

When the counsel for the defendants mentioned 11 Johns. R. 50, the case of *Frizbee v. Hoffnagle*, Mr. Justice COWEN observed that it had been overruled by *Vibard v. Johnson*, 19 Johns. 77, and on looking at it the counsel asked leave to be heard in respect to it at a future day, which was granted.

Whitney v. Lewis.

He subsequently suggested that if it were conceded (which, however, he insisted should be shown by the plaintiff,) that the defendants went *into possession of the land* conveyed, still it appearing by the pleadings that neither party had any right there, it was manifest that there was no consideration in whole or in part for the bond, and the plaintiff was not entitled to recover. Such was the decision in *Frizbee v. Hoffnagle*, which case he contended was not overruled by *Vibbard v. Johnson*, which had reference to a sale of *chattels*, and depended upon peculiar circumstances: on the contrary, *Frizbee v. Hoffnagle* is cited with approbation in *McAlister v. Reab*, 4 Wendell, 483, 491. Again: he submitted whether *Vibbard v. Johnston* is not itself overruled by *Case v. Boughton*, 11 Wendell, 106, and *Head v. Stephens*, 19 Wendell, 411, in each of which cases the defendant went into possession of the thing purchased, and subsequently defeated a recovery of the consideration, on the ground of a false warranty in the first, and a want of title in the second case.

By the Court, BRONSON, J. Fraud is not alleged. The plea only amounts to this—the plaintiff, knowing that the fee of the land was in a third person, conveyed the same to the defendants, with a covenant for quiet enjoyment. There is no allegation that the plaintiff made any false representation, or any representation whatever concerning the title. For aught that appears, the defendants knew as much about the title as the plaintiff; and the one party may have been as willing to take the deed and trust to the covenant, as the other was to give it. The conclusion which the defendants draw, that *so they have been defrauded*, does not follow from the facts set forth in the plea; and if there was no fraud, the defence cannot prevail.

The defendants are also mistaken in supposing that the plea shows a failure of the consideration on which the bond was given. This is not like the case of dependent covenants, or conditions precedent in a deed, where performance by one party depends on the prior performance of the other: nor is it the case of mutual stipulations to do con-

Whitney v. Lewis.

current acts, where neither can maintain an action until he has offered to perform his part of the agreement. It is much like the case of mutual promises, where the *undertaking* on one side, not the *performance*, is the consideration for the undertaking on the other ; and both parties may have an action. *Close v. Miller*, 10 Johns. R. 90., The agreement of one party was the consideration for the agreement of the other. The plaintiff conveyed and covenanted, in consideration of the defendants' obliging themselves to pay \$2500 ; and the defendants bound themselves to pay that sum, in consideration of the conveyance and covenant by the plaintiff. The consideration on both sides was *executed*—not executory. Nothing was to be done in future. Although a right of action might afterwards accrue to both parties—to the one on the covenant for quiet enjoyment, and to the other on the bond ; yet no subsequent event could make it strictly accurate to say that an executed consideration had failed. If the defendants were to sue on the covenant for quiet enjoyment, it would be no answer to say that they had not paid the bond ; and in this action on their obligation, I do not see how a breach (if it had been alleged) of the plaintiff's covenant, could be a defence. It would be allowing a set off of one action against another.

But however the case might have stood had there been a breach of the covenant for quiet enjoyment, the plea furnishes no ground for saying that the consideration of the bond has failed. It is not alleged that there has been an eviction from the land, or, indeed, that any thing whatever has happened since the contract was made. It falls much short of the case of *Frizbee v. Hoffnagle*, 11 Johns. R. 50, on which the defendants rely, for there it appeared that the title to land which had been conveyed with warranty had subsequently been defeated by sale under a judgment against the vendor. This failure of title was allowed to be set up as a defence to an action on a note which the defendant had given to secure the purchase money of the land, although there had been no eviction. But this case

Whitney v. Lewis.

was virtually overruled in *Vibbard v. Johnson*, 19 Johns. R. 77. See also *Lattin v. Vail*, 17 Wendell, 188.

The plea neither makes out a failure, nor does it show an original *want* of consideration. Although the plaintiff had *no title whatever*, yet, if there was no fraud, the conveyance of the land with a covenant for quiet enjoyment was a sufficient consideration for an undertaking to pay the money. But the case stands much stronger than this for the plaintiff. If title to the land were the only consideration for the bond, still the plea does not go to *the whole* consideration. It is not alleged that the plaintiff had no interest whatever in the land, but only that he was not seised *in fee*, and that the defendants have not acquired *the fee*. All this may be true, and yet the plaintiff may have had a life estate, or a term of 100 years in the land. So too, the legal fee may have been in a third person while the whole beneficial interest was in the plaintiff; and although the defendants did not acquire the fee by the deed, they may have acquired a right to a conveyance from him in whom the fee is vested. Again, if the defendants get nothing else, the actual seisin or possession of the land may have passed by the deed; and, so far as appears, they are now in the quiet enjoyment of the property. If the defendants have derived a benefit under the contract, though less than they expected to receive, they cannot now rescind it. The only way that justice can be done to both parties, is by leaving each to his action. *Boone v. Eyre*, 1 H. Black. 273, note (a). *Campbell v. Jones*, 6 T. R. 570. *Franklin v. Miller*, 4 Ad. & El. 509. *Stavers v. Curling*, 3 Bing. N. C. 355.

Judgment for plaintiff.

Lefferts v. De Mott.

LEFFERTS vs. DE MOTT & INGERSOLL.

One of several *partners* is a competent witness for his *copartners* in an action against them in which he is not made a defendant for a debt claimed to be due by the firm, if he be released by his copartners from all liability for contribution.

The king's bench of England holds that to render such a party competent, it is necessary, in addition to the release of his copartners, that he release to them his interest in the *surplus* of the assets of the firm as far forth as the same may be affected by the demand in controversy: such release for that purpose is here held unnecessary.

THIS was an action of assumpsit for wheat sold and delivered in October, 1834. The cause was referred, and at the hearing before the referees the plaintiff made out a *prima facie* case by proving a delivery of the wheat at the store house of *De Mott, Ingersoll & Co.*, of which firm the defendants were members.

The defendants called as a witness *Halsey Sandford*, who was a member of the firm of *De Mott, Ingersoll & Co.*, which was dissolved in 1835. Sandford was not made a party defendant. They offered to prove by him that the wheat was not delivered on a sale to *De Mott, Ingersoll & Co.*, though received at their store house; but that it was delivered and received on account of *De Mott & Sandford*, another firm of which the witness was a member with *De Mott*, the now defendant. *Sandford*, at the request of the plaintiff, was sworn on his *voir dire*, and testified that he was a member of the late firm of *De Mott, Ingersoll & Co.*, and produced a release under seal whereby the defendants jointly and severally released him "from all and every claim and demand which we now have or hereafter may or can have against him, by reason of this suit, and the matters in controversy therein or by reason of any recovery which may occur therein." The plaintiff objected to the competency of Sandford as a witness, and the objection was sustained. He then further testified in his *voir dire*, that the firm of *De Mott, Ingersoll & Co.* had no joint property subject to an execution at law, of which the witness had any

Lefferts v. De Mott

knowledge, and that he had executed a release to *De Mott* and *Ingersoll*, which was produced, whereby he released them "from all and every claim and demand which I now have or hereafter may or can have against them by reason of this suit and the matters in controversy therein, or by reason of any recovery which may occur therein." The plaintiff persevered in his objection, and the witness was rejected by the referees, who reported in favor of the plaintiff. The defendants now move that the report be set aside, and for a rehearing.

L. H. Sandford, for the defendants.

I. Williams, for the plaintiff.

By the Court, COWEN, J. The English rule formerly was, that a partner of the defendants, though omitted as a party, could not be rendered competent by any interchange of releases between him and his copartners, because, should the plaintiff fail to collect the debt of the defendants by reason of their death or insolvency, he might still sue the witness in equity. 1 Phil. Ex. 60, 134, 7th ed. *Cheyne v. Koops*, 4 Esp. R. 112. *Simons v. Smith*, Ryl. & Mood. N. P. Cas. 29. There is, however, according to our own cases and one in Massachusetts, an end of all claim both at law and in equity against the partner not sued, by a recovery in a separate action against his copartners. *Robertson v. Smith*, 18 Johns. R. 459. *Gibbs v. Bryant*, 1 Pick. 118. *Penny v. Martin*, 4 Johns. Ch. R. 566. This is a general if not an universal rule as to *joint debtors*, and even *joint and several debtors*, who are sued jointly. A judgment against one extinguishes all farther remedy against the other on the original obligation. *Beltshoover v. The Commonwealth*, 1 Watts, 126. *Williams v. M'Fall*, 1 Serg. & Rawle, 290. *Downey v. Farm. & Mech. Bank of Greencastle*, 13 id. 288. See also *Bedell's adm'r v. Keethley*, 5 Monroe, 601, and *Vaneman v. Herdman*, 3 Watts, 202. Therefore in *Bagley v. Osborne*, 2 Wendell, 527, this court held that a release from the defendant to the witness restored his competency. See

Lofferts v. De Mott.

also *Willings v. Consequa*, 1 Peters' C. C. R. 301, 306, S. P. *Le Roy, Bayard & Co. v. Johnson*, 2 Peters' R. 186, S. P. See also *Chapman v. Andrews*, 3 Wendell, 240, 243; *Ransom v. Keyes*, 9 Cowen, 128; *Clarkson v. Carler*, 3 id. 84; and *Robertson v. Mills*, 2 Har. & Gill, 98. The king's bench in the late case of *Wilson v. Hirst*, 4 Barn. & Adol. 760, have come to the same result upon similar premises, with the qualification that instead of a single release, viz. from the defendants to the witness, there must be mutual releases, as in the case at bar. Mr. Phillips, therefore, in his 8th edition, A. D. 1838, 1 vol. p. 153, 4, has recanted his former rule. The English case cited proceeds on the notion that, by a recovery against the defendants, the *surplus* of the witness on winding up the accounts of the firm will be diminished, and that he should therefore be required to release his interest in that surplus, at least so far as it may be affected by the sum in controversy. He is supposed, without such release, to be still testifying in favor of a fund in which he is interested. I have thought a good deal of that, on different occasions, but never could see how the witness partnership balance was to be affected, after the defendants, by their release to him, had cut off all claim to contribution either for damages or costs. Surely they can never afterwards make any charge which shall diminish his interest in any way. Can the plaintiffs proceed by execution against the partnership fund in his possession? According to our own decisions, and what fell from the king's bench in *Wilson v. Hirst*, there is an end of the partnership claim, as such, be the recovery which way it will. The plaintiff has individualized the debt. To be sure, he may levy on the common property; but I take it this must be like any other levy upon an execution against A. on the goods of A. and B., copartners. It stands subject to an account between A. and B., when the share of A. alone after firm debts paid is made available. Such a consequence is no argument for shutting out the copartner of A. as interested. His oath is directed, not to the protection of his own, but A.'s interest only.

.. In the case at bar, if mutual releases were necessary, there may be some question whether that executed by Sand-

U. & S. R. R. Co. v. Brinckerhoff.

ford was so worded as to reach and cut off his *surplus*; but I cannot bring myself to think that a release from him was necessary. An additional reason, if any be requisite, is as stated by Sandford on his *voir dire*, that no property was left to the firm which was tangible to a legal execution; and it is clear that the choses in action of the firm could not be reached by a creditor's bill beyond the defendant's separate interest subject to an account.

There is however, I think, no reason for revising the doctrine of *Bagley v. Osborne*, and adding the release from the witness. That which he received here was sufficient in form; it simply discharged him from all contribution, and in legal effect therefore, threw the whole suit upon the shoulders of the defendants. The referees evidently proceeded on the notion, as it formerly stood in the English books, of the witness' ultimate liability on his copartner's death or insolvency. In this we think they erred.

The report must, therefore, be set aside, and the cause be reheard by the same referees, the costs to abide the event.

THE UTICA AND SCHENECTADY RAIL ROAD COMPANY
vs. BRINCKERHOFF.

Where it was alleged in a declaration that an agreement was entered into between a rail road company and an individual, by which the latter stipulated, that if the former would locate their road and terminate it at a certain place, and should require certain lands in the vicinity of such termination for the purposes of the road, that he would pay the damages which should be appraised to the owners of the lands; and the plaintiffs then proceeded to aver that the agreement being so made, afterwards, to wit, on, &c., at, &c., in consideration thereof, and that the plaintiffs had promised to perform on their part, the defendant promised to perform on his part; It was held, that the promise of the individual was not binding, inasmuch as by the agreement no obligation was incurred on the part of the company, and that the promise of the company set forth as made subsequent to the agreement, was not a sufficient consideration to sustain the promise of the defendant.

DEMURRER to declaration. The plaintiffs declared against the defendant Elizabeth Brinckerhoff, that by a certain agreement made in writing between the plaintiffs and the

U. & S. R. R. Co. v. Brinkerhoff

defendant, on, &c., at, &c. it was stipulated, that if the plaintiffs should locate their road on Water street, terminating at the square at the lower end of Genesee street in Utica, and should require for the purposes of their road certain lands in the vicinity of such square (particularly describing them,) that the defendant in consideration of the benefits which she would derive from such location, would pay such sum as the said lands should be appraised at, in case the same should be taken by the plaintiffs for the purposes aforesaid, and should be appraised according to the act incorporating the company, as soon as such appraisal should be duly confirmed. The plaintiffs then proceed as follows: "And the said agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, and at the place aforesaid, in consideration thereof, and that the said plaintiffs at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfil the said agreement in all things on their part to be performed and fulfilled, the said defendant undertook and then and there faithfully promised the said plaintiffs, to perform and fulfill the said agreement in all things on her part to be performed and fulfilled." The plaintiffs then aver general performance on their part, and that afterwards, to wit, on, &c., at, &c., they did duly locate their road at the place designated in the agreement; that they required for the purposes of their road the lands in the agreement described, and took the same for the purposes aforesaid, and although the lands were appraised according to the act incorporating the company at the sum of \$7590, and although the appraisal was afterwards, to wit, on, &c., at, &c., duly confirmed, of all which the defendant had notice, yet, the defendant had not paid, &c. There was a *second* count substantially like the first, except that it set forth in detail the lands taken and the proceedings had for the appraisement of the same. The defendant demurred to each count, assigning as special causes of demurrer to the *first count* that no consideration for the agreement of the defendant was shown, nor was it averred that there had been a legal appraisement of the

U. & S. R. R. Co. v. Brinckerhoff.

lands; and to the second count, 1. No consideration was averred; 2. It was not averred that an appraisement was necessary; and 3. It was not shown that the defendant had notice of the appointment of appraisers or of their meetings, &c. The plaintiffs joined in demurrer.

S. Stevens, for the defendant.

M. T. Reynolds, for the plaintiffs.

By the Court, NELSON, Ch. J. The difficulty in sustaining this action is, that no consideration appears for the undertaking of the defendant. The written instrument is but a simple proposition, and no averment that it was acceded to by the plaintiffs. The fact that they afterwards located the road agreeably to the terms of the proposition is, of itself, nothing; it should have appeared that they had agreed with the defendant, thus to locate it as a consideration for the promise. The promise of each must be concurrent and obligatory *at the same time* to render either binding, and should be so stated in the declaration. 1 Caines, 585. 4 Johns. R. 235. 7 id. 87. 3 T. R. 653 & 148. 9 Wend. 336.

This case is not unlike *Burnet v. Biscoe*, 4 Johns. R. 235, and *Cooke v. Oxley*, 3 T. R. 653. In the first the defendant made an agreement with the plaintiff on the 20th February, by which she agreed to give him the refusal of her farm for two years, from the 1st April following, on certain terms specified. The plaintiff averred that on the 1st April he performed the agreement, &c. On demurrer, the court say, there was no consideration stated—that though the defendant agreed to give the refusal of the farm, the plaintiff did not agree to take it—that there was no promise on his part for the promise of the defendant, nor any money paid, or other valuable consideration given. The other case is, if possible, still stronger. There the defendant agreed to give the plaintiff till four o'clock, P. M. to agree to the proposal, and the declaration averred that he did agree and gave notice before the hour—still the judgment was arrested. *At the time of entering into the contract* the engagement was

Odell v. Buck.

considered all on one side—and it did not appear that the parties came to any subsequent agreement.

The pleader in the cause before us, assumes that the instrument was obligatory on both parties on the 4th August, when it was executed by the defendant, and upon the strength of the legal liability arising thereupon alleges, as usual, mutual promises by the parties to fulfil and perform the aforesaid *agreement*. Where this legal liability arises from the contract as set forth, it is sufficient to state it without alleging formally that the defendant promised. 1 Chitty's Pl. 299. 2 N. R. 62. And it is equally clear, if none appears, the *super se assumpsit* will not help the count. Without the *legal liability*, the promise fails.

The radical vice in the pleading is, that the *agreement, and the undertaking and promise of the plaintiffs to perform it*, which they set forth as the sole *consideration* for the promise of the defendant, amounts to nothing, as the agreement is not binding upon them—it is an agreement only upon one side.

The other objections I am inclined to think untenable. The appraisal referred to, was to be made agreeably to the act of incorporation in such cases provided.

Judgment for defendant.

ODELL vs. BUCK and others.

Imbecility of mind, not amounting to *lunacy* or *idiocy* in the grantor of land, is not sufficient to avoid his deed, where, in the obtaining it, there is no *fraud*.

The doctrine on this subject, laid down in *Jackson v. King*, 4 Cowen, 207, approved and adopted.

THIS was an action of *ejectment*, tried at the Delaware circuit in May, 1838, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

The plaintiff claimed under a deed to him from *Levi Buck* and his wife, dated March 29, 1830. The defence was, that *Buck*, at the time the deed was given, was incompetent to contract on the ground of *idiocy* or *insanity*. The

Odell v. Buck.

charge of the judge was unexceptionable, and the jury found a verdict for the defendants, which the plaintiff now moves to set aside, as against evidence.

L. Monson, for the plaintiff.

M. T. Reynolds, for the defendants.

By the Court, BRONSON, J. From the evidence, it satisfactorily appears that *Buck*, at the time the deed was executed, was not a *lunatic*, or one who had lost the use of that reason or understanding which he once had. His capacity for business was then very much the same that it had always been, though possibly his mental energy had diminished a little. He was not an *idiot*, or "one that hath *no understanding* from his nativity." Although a man of *imbecile mind*, he had reason and understanding.

Fraud was not set up as a ground of avoiding the deed, but the case turned wholly on the *incapacity* of the grantor to contract. This question was fully considered in *Jackson v. King*, 4 Cowen, 207. According to the doctrine of that case, it is impossible to say that this deed was void. No part of the evidence goes far enough to show a *total* want of understanding; and most of the evidence proves quite the contrary. He made contracts of several descriptions, and with such care and caution as evinced considerable mental energy. He had been at school, and learned to read and write; he performed military duty; was a member of a religious society; was married by the clergyman of that society a few months before the deed was executed; he appealed to the law for the vindication of his rights. He was a man of *weak mind*, but neither a *lunatic* nor a *fool*.

Following the case of *Jackson v. King*, I think we are bound to set aside the verdict as against evidence, on payment of costs.

New trial granted.

Brizsee v. Maybee.

BRIZSEE & TORRENCE vs. MAYBEE.

In *replevin*, where the defendant has obtained judgment *de retorno*, and sued out a writ of inquiry to have his damages assessed for detention, the measure of damage ordinarily is the *interest* upon the value of the goods when taken, from the time of the taking until the *quarto die post* succeeding the execution of the writ of inquiry.

The cost of manufacturing a raw article for and transporting it to market may properly be inquired into, to ascertain the value of the article at the time and place of its taking; but that once being fixed, the measure of damages is the legal interest upon such value.

It seems, however, that where a writ of replevin is sued out *fraudulently*, or *without color of right*, that a jury would be warranted in giving exemplary damages, as in a case for a wilful and malicious trespass.

DAMAGES in replevin. The defendant in an action of *replevin* brought by the plaintiffs for about 200 saw-logs, obtained judgment for a return of the property, and sued out a writ of inquiry of damages, &c. The logs measured 63,582 feet, board measure, and cost the defendant \$3 25 per 1000 feet, delivered on the canal near his saw-mills in Royalton, Niagara county, where they were replevied by the plaintiffs in the summer of 1832. The writ of inquiry was executed in January, 1838. The defendant proved that his principal business was the sawing of logs, and transporting the stuff to market; that he might have sawed the logs, taken by the plaintiffs under the writ of replevin, in the summer of 1832; that those being taken away, he had an inadequate supply for his mills; and that it was difficult to supply the deficiency before the ensuing winter. He also proved what would have been the value of the stuff, made from the logs taken by the plaintiffs, in the Albany and Troy markets in the summer of 1833, (at which *time* it would, in the ordinary course of business, have reached those places, and at which *places* the defendant usually dealt,) deducting from such estimate the cost of preparing the lumber for and transporting it to market. The defendant also proved that the logs in question were *sawed* by the plaintiffs: All which evidence was objected to by the plaintiffs as inadmissible, on the ground that the proper measure of damages was the

Brizoe v. Maybee.

difference between the value of the logs at the time of the deliverance, and what would have been their value at the present time, with interest from the time of deliverance ; but the objection was overruled, and the testimony received. By the inquisition, it appears the plaintiff's damages were assessed at \$452.

A. Taber, for the plaintiffs, moved to set aside the inquisition.

J. A. Spencer, for the defendant.

By the Court, COWEN, J. In this case the judgment for a return will enable the defendant to recover the value of the logs, if not specifically returned, as it seems they cannot be, for it was in proof that the plaintiff had converted them. The object of the writ of inquiry was to assess damages for the *detention*. This is ordinarily, as in *trespass de bonis or trover* the interest upon the value of the goods when taken, from the time of the taking to the day of assessing the damages, or perhaps the *quarto die post* or judgment day of the succeeding term. There are exceptions to this rule, as where it appears in an action of trespass that the goods were taken tortiously, and without color of right. In such case the jury may assess exemplary damages.

It has lately been held at nisi prius, that the plaintiff may recover special damage in *trover*, where it is laid in the declaration. The defendant had taken the plaintiff's pony, which was useful to him in the way of his trade; and he was allowed to recover the consequent expense of hiring another horse, deducting from that the amount he would have paid for keeping his own horse during the time. *Davis v. Oswell*, before Parke, B., 7 Carr. & Payne, 804. It was agreed that the point had never been decided; and it would be extremely inconvenient, not to say dangerous, to allow a plaintiff to lie still in his trade for such an inadequate cause, and charge the defendant with all the profits of his business upon the conjectural estimate of a jury.

Where the writ of replevin has obviously been perverted to the purpose of a wilful injury, with a full consciousness in
VOL. XXI.

Brizsee v. Maybee.

the plaintiff that he has no claim, the jury may perhaps assess smart money, as they might for a wilful and malicious trespass. That would certainly be going far enough. It supposes a right to recover damages as for a malicious prosecution; and to go even thus far would be dangerous unless a malicious replevin be considered as an exception to the rule which allows an independent action for a vexatious suit.

Here was no evidence before the under sheriff that the wrong done by the replevin in question, was any thing more than the honest assertion of a supposed claim by the plaintiffs. That they acted fraudulently, is not to be presumed; but the contrary. Much of the evidence given before the under sheriff was admissible to show the market value of the goods at the time when, and place where, they were taken by the writ. The ultimate value at Albany or Troy, when in the ordinary course of business the boards would reach there, deducting the expense of manufacture and the price of transportation, were proper topics of inquiry, with a view to the ascertainment of value at the canal; but that once being fixed in the mind of the jury, the measure of damages was in this case the legal interest upon such value to the day of the inquisition, or at farthest to the next term. Special damages for interruption in the defendant's business could not be allowed; and, therefore, the testimony received with a view to fix their amount should have been excluded. I can hardly suppose a case in which this evidence would be admissible, unless where the plaintiff is shown to have fraudulently brought his replevin for the purpose of working such a mischief. It is enough to say that the damages found here are much too high upon any principle which the jury were authorized to adopt. I cannot collect from the evidence that the logs were worth over \$250 or \$260; and the inquisition has, for a detention of that sum about six years, allowed \$452.

The inquisition must be set aside without costs.

WELCH vs. ALLEN & SILLIMAN.

Where a *trust* of lands is wholly nominal, the trust becomes executed by the statute in the *cestui que trust*, who may maintain ejectment for the recovery of the lands in *his own name* without a previous conveyance from the trustee.

Where lands are granted to a *trustee* without words of perpetuity, he will by implication of law take a *fee*, if such estate be necessary to fulfill the objects of the trust.

Where a trustee was directed to dispose of the lands granted to him, and to apply the proceeds to the support of a certain individual and his family, and after the decease of such individual to pay the *residue*, if any, to his legal representatives; it *was held*, in an action between the heir at law and mere naked possessors, that on the death of such individual the land passed to his heir at law, it not appearing that it had been disposed of by the trustee.

THIS was an action of *ejectment* tried at the Wayne circuit in April, 1838, before the Hon. DANIEL MOSELY, one of the circuit judges.

The plaintiff (Morris Welch) produced in evidence an act of the legislature of this state, passed 26th March, 1802, directing the commissioners of the land office to grant letters patent to *Matthias B. Tallmadge*, in trust for *John Welch*, his heirs and assignees, for 450 acres of unappropriated lands; and declaring that Tallmadge should dispose of the same, and apply the proceeds to the support of John Welch and his family, and *after his decease* pay the residue, if any there be, to his legal representatives. The plaintiff also produced in evidence letters patent, issued by the commissioners of the land office to Tallmadge for 600 acres of land, the premises in question, excepting thereout 150 acres in the southeast corner of the tract, in trust for the said John Welch, his heirs and assigns, *pursuant to the statute* above recited. The plaintiff then proved that Tallmadge *died* in 1820, and that John Welch *died* in 1811, leaving the plaintiff his only child and heir at law. The plaintiff rested. The defendant moved for a *nonsuit*; it appearing that the legal title was in Tallmadge as trustee, and that the plaintiff as *cestui que trust*

Welch v. Allen.

was not entitled to maintain this action *in his own name*. The judge nonsuited the plaintiff, who now moves for a new trial.

S. Stevens, for the plaintiff, insisted that the *trust estate* in Tallmadge ceased on the death of *John Welch*, the object of the trust having then terminated; and that the plaintiff being entitled to the *residue*, or what was left of the estate granted for the benefit of his father, *became seised* of the land on the death of his father, and that without any conveyance from the trustee, 1 R. S. 727, § 47; 730, § 67. If it was necessary that there should have been a conveyance, the jury would have been warranted in finding that it had been executed, upon the presumption of law that such was the fact.

M. T. Reynolds, for the defendants contended that the *trustee* had only a life estate in the premises, and upon his death the estate ceased; but if he had a greater estate, there are no circumstances from which a release to *John Welch* or to the plaintiff could be presumed. It was not the *duty* of the trustee to convey to either of them.

By the Court, NELSON, Ch. J. Assuming that Tallmadge took a *fee*, which I think he did, such estate being necessary to enable him to fulfill the object of the trust, that on his death it descended to his heirs or passed under his will, as the case may be, after the death of *John Welch*, and that the estate was not sold as directed in the trust deed, the *trust became wholly nominal*. No sale was contemplated after the death of *John Welch*; the reason for directing it was to obtain the means of support for him and his family during his lifetime, and on his death the *surplus* was to go absolutely to his heirs: the *estate* not having been sold, must take the same direction. Besides: the act and the letters patent pursuant thereto, direct that Tallmadge shall hold *in trust* for *John Welch*, his *heirs*, &c.

The *trust* therefore being merely *nominal* in 1830, when the revised statutes went into operation, it became executed in the *cestui que trust* by virtue of the 47th § of the ar-

Hanna v. Rust.

title on uses and trusts, 1 R. S. 727, and consequently the plaintiff holds the legal title, and is entitled to maintain the action.

New trial granted.

HANNA vs. RUST and others.

In an action of *trespass, assault and battery*, where the defendant justifies the assault on the ground that the plaintiff was making a noise and disturbance in his house, that he was requested to depart, and that on his refusal to do so the defendant laid hands on him *gently* to remove him—a replication that the plaintiff did not *wholly* refuse to depart, and that he remained no longer than was necessary to obtain his baggage, without excusing the noise *after the request*, is not a sufficient answer: besides, such replication is bad if it conclude to the *country*; it should conclude with a *verification*, so as to give the defendant an opportunity to answer.

So a replication containing new matter, alleging that the defendant of his *own wrong*, and with *more force and violence* than was necessary, committed the trespasses, should conclude with a *verification*.

Where a plaintiff in such action, in his replication, varies the *place* of the committing of the trespasses from that alleged in the plea, he *must expressly allege that the trespasses as newly assigned are other and different trespasses from those mentioned in the plea*, or the replication will be adjudged bad.

DEMURRERS to replications. The plaintiff declared in trespass, assault and battery, against three defendants, viz. *Rust, Winton and Stewart*. The defendant *Rust* pleaded, 1. the general issue, and 2. specially, that long before and at the said time when, &c. he was possessed of a certain public house at Syracuse, and the plaintiff a little before the said time when, &c. entered and came into the house, and then and there made a great noise and disturbance therein, and behaved himself in a rude, quarrelsome and uncivil manner towards the defendant *Rust*, and towards the defendant *Winton*, who was the agent and servant of *Rust* in keeping the said public house, and towards divers persons then lawfully in the house, and thereby greatly disquieted *Rust*, his family, and guests, &c. whereupon he, *Rust*, then and there requested the plaintiff to cease from making such noise and disturbance, and to depart from and out of the

Hanna v. Rust.

house, which the plaintiff wholly refused to do; whereupon *Rust*, in defence of the possession of his house, and for the purpose of preventing a continuance of the noise and disturbance, ordered and directed the defendant *Winton*, so being such servant and agent, gently to lay his hands upon the plaintiff in order to remove him from and out of the house, as he lawfully might for the cause aforesaid; whereupon *Winton* gently laid his hands upon the plaintiff in order to remove, and did remove him from and out of the house, as he lawfully might, &c.; which are the same trespasses, &c. without this, that *Rust* was guilty of the trespasses or any of them *elsewhere* than in the said house, &c. Verification.

The plaintiff, by leave of the court, put in *four replications* to this plea. *First*, not necessary to be noticed. *Second*. As to so much of the plea as alleges that *Rust* requested him to cease from making noise and disturbance, or to go and depart from and out of the house which the plaintiff wholly refused to do, the plaintiff says that at the time when, &c. he was a guest of *Rust* at his public house, and had been for two days previous, and his trunk and baggage was in the possession of *Rust*, as the keeper of the public house, and the plaintiff was necessarily indebted to *Rust* for his entertainment, whereupon he, the plaintiff, at the said time when, &c. immediately demanded of *Rust* his trunk and baggage, called for his bill, and offered to pay, and did pay the same, and made all possible and reasonable haste, to leave the house, and did not wholly refuse so to do in manner and form as *Rust* in his second plea has alleged, concluding to the *country*. *Third*. As to so much of the plea as alleges that *Rust*, in defence of the possession, &c. ordered *Winton* gently to lay his hands, &c. and that *Winton*, in pursuance of the order, did gently lay his hands upon the plaintiff and remove him, &c. the plaintiff says, that the defendant *Rust*, at the said time when, &c. *of his own wrong* committed the said several trespasses to a *greater degree* and with more force and violence than was necessary for the purposes in the plea mentioned, &c. Verification. *Fourth*. As to so much of the plea as alleges that the tres-

Hanna v. Rust.

passes were committed in the said public house *only*, the plaintiff says that he commenced his suit for trespasses commenced and committed in the said public house, and continued from within the house to the bar-room door, and from the door on to the stoop, and from the stoop on to the side walk in the public street, and into the public street, and that the same was one continued trespass from the beginning to the ending, and is the same trespass mentioned in the declaration. Verification. The defendant put in special *demurrers* to each of the above replications.

The pleadings in relation to the defendant *Winton*, raised the same questions as on the second and fourth replications to the second plea of *Rust*.

B. Davis Noxon, for the defendants.

J. A. Spencer, for plaintiff.

By the Court, BRONSON, J. The issue tendered by the *second* replication is too narrow. The plaintiff attempts to excuse his continuance in the house after a request to depart, without giving any reason for the noise and disturbance which he continued to make in the house *after the request*. And again: the point of the issue, as the plaintiff presents it, is, that he did not *wholly* refuse to depart. That may be true, and yet there may have been such a refusal as would authorize the host or his servant to remove him.

Another objection to the replication is, that it sets up new matter, and then concludes to the *country*. If the allegations that the plaintiff was a guest in the house, that he demanded his trunk, and called for and paid his bill, are of any legal importance, the replication should have concluded with a *verification*, so as to give the defendant an opportunity to answer the new matter.

The general replication *de injuria* would probably have reached all the pleader had in mind when he drew the second replication.

2. The defendant takes two objections to the *third* replication: *first*, that it should have concluded to the country;

Hanna v. Rust.

and *second*, that the master is not liable for the excess of his servant. The answer to the first objection is, that the replication contains new matter, to wit, that the trespasses were committed to a greater degree and with more force and violence than was necessary for the purposes mentioned in the plea. This new matter the defendant should have an opportunity to answer, and therefore the replication was properly concluded with a verification.

As to the second objection, the allegation in the replication is, that the defendant Rust, of his own wrong, committed the said trespasses to a greater degree, &c. It does not raise the question whether Rust is answerable for the excess of his servant Winton. That question may arise on the trial, if Rust takes issue on the alleged excess. This replication is good.

3. The fourth replication, or new assignment, is bad. It departs from the precedents in not alleging that the trespass newly assigned is another and different trespass from those mentioned in the plea. Gould's Pl. 366, n. (14.) p. 457, § 76. 1 Saund. 299, n. (6). 1 Chit. Pl. 612. 2 id. 701, 705. By omitting to traverse the plea, the plaintiff admits that the supposed trespasses in the house are justified; and yet he newly assigns those with other trespasses, and thus calls on the defendant to answer again, a matter which had already been sufficiently answered. If in truth, as the plaintiff alleges, there was but one continued trespass from the beginning in the house to the ending in the street, the plaintiff has, perhaps, covered the whole ground by his third replication that the defendant committed the trespasses to a greater degree and with more force and violence than was necessary for the purposes mentioned in the plea. But however that may be, there is no doubt that the plaintiff might have new assigned as to time, *place*, or any other material circumstance. He might have alleged that he commenced his action for an assault and battery *in the street*; and then have concluded according to the precedents, that the trespasses newly assigned were other and different from those mentioned in the plea. The defendant would then have answered, either denying or justifying the

Clark v. Faxton.

assault in the street. As the new assignment is drawn, it is difficult to say how the defendant can plead to it, if he has a good answer to offer; but if the pleader had followed the precedents, there would have been no difficulty in answering.

The plaintiff is entitled to judgment on the demurrer to the *third* replication to the second plea of *Rust*; and *Rust* is entitled to a judgment on the demurrers to the *second* and *fourth* replications to his second plea. The defendant *Win-ton* is entitled to judgment on the demurrers to the replications to his pleas.

Ordered accordingly.

CLARK vs. FAXTON and others.

In an action against stage-coach proprietors as *common carriers*, for the loss of goods entrusted to them, where the route of the road occupied by them is stated in the declaration as *more extensive* than it is in fact, a *nonsuit* will not be granted for the variance, if in truth the goods were actually received by them and lost upon that portion of the road which they occupied; and on the contrary, *leave* will be given to the plaintiff to *amend without costs*.

Notice that all boxes and parcels sent by a stage-coach will be *at the risk of the owners*, does not relieve a common carrier from responsibility, though brought home to the knowledge of the owners of the goods.

THIS was an *action on the case*, tried at the Oneida circuit, in May, 1838, before the Hon. ROBERT MONELA, one of the circuit judges.

The defendants were sued as *common carriers* and charged with the non-delivery of a box of merchandize entrusted to them in December, 1836, at *Batavia*, for carriage to *Utica*. The declaration stated that they were common carriers of goods and chattels *from Batavia to Utica*. Whereas, by the proof, it appeared that they were carriers *only between Utica and Canandaigua*, and that from the latter place to *Buffalo*, a line of stage-coaches was owned and run by other persons, passing on their way through *Batavia*. The box of goods in question was delivered at the coach office

Clark v. Faxton.

at *Eatavia*, and carried on to *Canandaigua*, where it was received at the office of the defendants and entered upon a way-bill for *Utica*. After proving the value of the goods, the plaintiff rested. The defendants moved for a *nonsuit*, on the ground of the variance between the declaration and proof as to the *termini* of the rout occupied by the defendants as common carriers; which motion was denied. The defendants then proved a *printed notice* with the name of the *firm* of the defendants, and the names of several other firms of common carriers, occupying the whole route of travel from *Albany* to *Buffalo* attached thereto, to the effect that they would not be responsible for boxes or parcels sent by their stage-coaches, but that the same, if sent, would be *at the risk of the owners*, and proved that the same had been posted in a conspicuous place in the stage office at *Utica* since the year 1832, where a person entering the office could not fail to observe it; that the plaintiff had been frequently in the office and sent goods and packages in the defendants' coaches to the eastward; that in December, 1835, the plaintiff boarded in a coffee house in a room of which the office of the defendants was kept, and that a similar notice was posted in the bar-room of the coffee-house. This evidence in relation to the notice was received by the judge subject to objection. The judge charged the jury that if they should find that the defendants were owners of the line of stages *between Canandaigua and Utica*, that they received the box of goods, and that the same was lost; the plaintiff would be entitled to their verdict, as the *notice*, though they should be satisfied that it came to the knowledge of the plaintiff, would not relieve the defendants from liability. The jury found for the plaintiff. The defendants ask for a new trial on three grounds: 1. That the plaintiff should have been nonsuited for the variance between the declaration and proof; 2. That the charge of the judge was erroneous in respect to the effect of the notice; and 3. That the judge erred in deciding upon the sufficiency of a notice given by the plaintiff for the production of books, as preliminary to the introduction of *parol* proof.

Clark v. Faxon.

C. P. Kirkland, for the defendants.

J. L. Tillinghast, for the plaintiff.

By the Court, COWEN, J. I do not collect from the account of the notice published by the defendants, that they took any pains to indicate the true limits of their interest, which undoubtedly lay between Utica and Canandaigua. The notice however left the public to infer that the defendants were interested farther; even from *Albany* to *Buffalo*. The complaint therefore of the mere formal mistake in stating the *termini* does not call for any favor. It is but form, for there is no doubt that the trunk was lost within the range of their actual interest. It is clear that the circuit judge might overlook such a variance, and that we might allow an amendment on terms even in a case where the defendants had no share in the mistake. *Lion ex dem. Eden v. Burtis*, 18 Johns. R. 510. *Hull v. Turner*, 1 Wendell, 72. But in a case such as this, where the defendants, in one construction of their notice, spoke of an interest more than commensurate with the *termini* in the declaration, I think they should hardly be received to allege the variance. They seem to have supplied the defect in the plaintiff's proof by showing a case in which the plaintiff was perhaps entitled to treat them for all purposes, as carriers from *Batavia* to *Utica*, if not farther. At any rate, the plaintiff may, under the circumstances, amend without costs; and the new trial should be denied with the usual costs of the plaintiff to be taxed in the general bill. For the two other points made in the cause, there is clearly no foundation.

New trial denied.

Richardson v. Gere.

RICHARDSON vs. GERE.

A *commission* issued to take the testimony of a witness, and the testimony taken under it, are not admissible in evidence, *although returned by mail, addressed to the clerk, &c. unless an order or direction for its return in that manner was made by the officer settling the interrogatories.*

THIS was an action of *ejectment for dower*, tried at the Tompkins circuit, in September, 1837, before the Hon. ROBERT MONELL, one of the circuit judges.

The plaintiff, to prove her right to recover, produced a *commission* sued out to *Illinois*, and the testimony taken under it, which was received by the judge, although objected to by the defendant as inadmissible. The commission was allowed by a circuit judge, and the *interrogatories* to be attached thereto were settled and allowed by a supreme court commissioner, who endorsed upon the commission a direction in these words: - "Let the within commission and the testimony taken under it be returned to Arthur S. Johnston, clerk of the county of Tompkins, Ithaca, New York. Dated 18th March, 1837." It was admitted that the *commissioner* named in the commission, and the witness to be examined, resided at *York, Clark County, Illinois*; that the commission and testimony were in fact *returned by mail*, enclosed in a wrapper, post marked *York, Clark Co. Illinois*, directed to Arthur S. Johnston, Ithaca, Tompkins county, and that the commission and testimony so enclosed were taken from the post office in Ithaca by Arthur S. Johnston, clerk of the county of Tompkins. The plaintiff obtained a verdict, and the defendant asks for a new trial.

J. A. Spencer, for the defendant.

D. Cady, for the plaintiff.

By the Court, NELSON, Ch. J. The commission, I am of opinion, was improperly admitted. The statute, 2 R. S. 394, § 14, prescribes that the officer settling the interrogato-

Chappel v. Brockway.

ries shall "*direct the manner in which it shall be returned, and may, in his discretion, direct the same to be returned by mail, addressed to the clerk,*" &c. It then provides, § 16, sub. 5, that if *there is a direction on the commission to return the same by mail*, they [the commissioners] shall deposit the packet in the nearest post office, &c.; and by sub. 6, if there be a direction to return the same *by an agent* of the party who sued out the same, it shall be delivered to him. The old statute, 1 R. L. 520, provided that the commission should be returned by one of the commissioners, or an agent of the party; the revised statutes have extended the provision so as to enable the officer, *in the exercise of his discretion*, to authorize a return by mail.

This is a statute proceeding, innovating upon the common law rules of evidence, and must be strictly complied with. Without the *direction* provided for by the act, I do not see how a return can be legally made at all; for in the absence of it, there is no mode recognized by the law. The commission would be nugatory in this respect. But it is clear, that the *return by mail* is admissible *only* by the permission of the officer, in the exercise of his discretion. The statute puts it upon this footing in express terms.

New trial granted.

CHAPPEL vs. BROCKWAY.

Contracts in restraint of trade, which totally prohibit the pursuit of an occupation, or the carrying on of a particular business, at any place in the state, are void, as detrimental to one party without being beneficial to the other, and also as injurious to the public, let the consideration moving to the contract be what it may: but contracts for a limited restraint, as that a man will not exercise his trade or carry on business in a particular place or within certain limits, are valid and will be enforced by the courts, if it be shown that they were entered into for good reasons.

It seems that it is not enough that there be a consideration, such as would uphold a contract in which the public have no interest; but that whatever may be the pecuniary consideration, it must appear in addition that there was some good reason for entering into the contract, and that it imposes no restraint upon one party which is not beneficial to the other.

Chappel v. Brockway.

How far the restraint may extend, depends upon the nature of the business to which the contract relates; as a general rule, it may be said to extend far enough to afford a *fair protection* to the purchaser of the business which the seller agreed to relinquish.

Where the plaintiff and defendant were competitors in running packet boats on the Erie canal *between Rochester and Buffalo*, and the defendant, for the consideration of \$12,500, was induced to sell out to the plaintiff his boats and other property connected with the business, and to enter into a bond in the penal sum of \$25,000, that he would not at any time thereafter, own, run or be interested in any line of packet boats on the canal, *within the limits before occupied by him*: it was held, that the bond was valid; there being not only a *sufficient pecuniary consideration*, but a *good reason* for the contract.

CONTRACTS in restraint of trade. The plaintiff declared on a bond dated 9th July, 1835, in the penal sum of \$25,000, executed *to the plaintiff* by the defendant; which, after reciting that the defendant had been engaged in running a line of packet boats upon the Erie canal, that he had on the day of the date of the bond sold his boats and other property connected with them to the *Rochester and Buffalo Packet Boat Company*, for the consideration of \$12,500, and that he had agreed with the company as a part of the sale and purchase of the boats, &c. that he would not at any time thereafter run a line of packet boats, or be connected in any way with the packet boat business on the Erie canal: was *conditioned* that the defendant should not at any time thereafter, *own, run* or be *interested* in any line of packet boats on the Erie canal from Rochester to Buffalo; and a clause was inserted that in case of breach, the bond might be prosecuted for the benefit of the company. The plaintiff assigned three several breaches: 1. that on 1st of April, 1836, the defendant *commenced running* a line of packet boats on the Erie canal from Rochester to Buffalo, and continued to run the same until December following, &c.; 2. that the defendant *became interested* in a line of packet boats, &c.; and 3. that he *owned* a line of packet boats, &c.

The defendant put in a great number of pleas. His *tenth* plea was substantially, that himself and the Rochester and Buffalo Packet Boat Company were competitors for business on the Erie canal, each running a line of packet boats between Rochester and Buffalo; that the company, by re-

Chappel v. Brockway.

ducing the rates of fare, compelled him to sell out to them ; that the object of the company was to obtain a monopoly, and when they had no competitor they raised the prices and thus enriched themselves at the expense of the public. Under these circumstances he became the owner of a *new* line of packet boats, by means of which travellers were again furnished with a *cheap*, safe and convenient mode of transportation. To this plea the plaintiff *demurred*. The defendant's *eleventh* plea was substantially like the *tenth* ; to it the plaintiff replied ; the defendant rejoined, and the plaintiff *demurred* to the rejoinder.

A. Taber, for the plaintiff.

J. A. Spencer, for the defendant.

By the Court, BRONSON, J. The common law will not permit individuals to oblige themselves by a contract, where the thing to be done or omitted is injurious to the public. Contracts in restraint of trade are, for the most part, contrary to sound policy, and are consequently held void. This is the general rule. There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid. The general presumption is against all contracts in restraint of trade, and consequently it lies upon him who seeks to enforce such an obligation, to show that it is free from objection.

Contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on business any where in the state, are void, upon whatever consideration they may be made. They must be injurious to the public, and no good reason can be shown why one individual should thus fetter himself, or another individual should contract for the restraint. The obligation is injurious to one party, without being beneficial to the other. But there may be good reasons for allowing parties to contract for a limited restraint, as that a man will not exercise his trade or carry on business in a particular place, and when such reasons are shown, the contract will be upheld and enforced.

Chappel v. Brockway.

The common law rule on this subject, undoubtedly had its origin at a time when there were, comparatively very few mechanics and tradesmen, and when there was much more reason for guarding against restraints of this kind than there can be now. Still I am unable to say, that the reason of the rule has so entirely ceased, that the rule itself is at an end.

It must be admitted, however, that courts at the present day look upon contracts of this description with much less jealousy than they did at a former period. At one time the contract, however free from objection in other respects, would have been held void, if made in the form of a *penal* obligation. But there is no longer any doubt that the party may bind himself to the performance of such a contract under a penalty, as well as by a covenant or promise. The modern decisions have also allowed a larger restraint than would formerly have been sanctioned, and one or two of the recent cases have gone nearly, if not quite, far enough to give up the principle upon which the courts originally acted, though without professing to do so.

The early cases relating to restraints of trade were reviewed, and the whole subject was very elaborately and ably considered by Parker, Ch. J., in the leading case of *Mitchell v. Reynolds*, 1 P. Wins. 181, which was decided in 1711; and very little light has been shed upon the subject since that time. The consideration which will uphold a contract of this kind, according to Ch. J. Parker, is that which shows *it was reasonable for the parties to enter into it*—that it was a *proper and useful contract*, such as could not be set aside without injury to a *fair contractor*; and he afterwards adds, that a particular restraint is not good *without a just reason and consideration*. It is not, I think, enough that there may be such a consideration as would be sufficient to uphold a contract in which the public had no interest. Whatever may be the pecuniary consideration, it must appear, in addition, that there was some good reason for entering into the contract, and that it imposes no restraint upon one party, which is not beneficial to the other. In *Horner v. Ashford*, 3 Bing. 322, Best. Ch. J., said, that

Chappel v. Brockway.

restraints extending to the whole kingdom were void, "because no good reason can be imagined for any person's imposing such a restraint upon himself. But it may often happen that individual interest and general convenience render engagements not to carry on trade or to act in a profession in a particular place, proper." In *Horner v. Graves*, 7 Bing. 735, the defendant bound himself not to exercise the trade of a surgeon-dentist within 100 miles of the city of York, and the court held the contract void, on the ground that it was for a larger restraint than was necessary for the protection of the plaintiff in the enjoyment of his trade. Tindal, Ch. J., said it was an unreasonable restraint, which interfered with the interests of the public. The same principle was recognized by Abbott, Ch. J., in *Hayward v. Young*, 2 Chitty's R. 407, though the contract in this case was held valid.

In *Pierce v. Fuller*, 8 Mass. R. 223, there was only a nominal consideration of one dollar, and it is difficult to discover on the face of the contract any very good reason for upholding it; but the court thought there were sufficient reasons for enforcing it. Sedgwick, J., who delivered the opinion, admitted that it must appear from the special circumstances, that the contract is reasonable and useful; and again—"the consideration must always be shown, that the contract may be supported by the special circumstances which induced the making of it." It may, I think, be questioned, whether the case is quite consistent with the principle on which the court professed to act. A similar remark is applicable to the decision in *Palmer v. Stebbins*, 3 Pick. 188. But it does not appear that the court intended to lay down a new rule.

In applying what has been said to the case at bar, we shall find no difficulty in pronouncing the contract between these parties valid. Laying the pleas out of view for the present, and looking at the contract alone, it appears that the defendant, for the consideration of *twelve thousand five hundred dollars*, sold out his stock in trade, and agreed that he would not thereafter engage in the same business in such a way as to injure the purchaser. There was not only a suf-

Chappel v. Brockway.

ficient pecuniary consideration, but a good reason is shown for entering into the engagement. Such an agreement would have been held valid more than two centuries ago, when the policy of guarding against contracts in restraint of trade was much more apparent than it is at this day of unparalleled competition. *Broad v. Jollyfe*, Cro. Jac. 596. Indeed, this branch of the case is so free from difficulty that I should have said less upon it, were it not for another case now before us, *Ross v. Sadgbeer*, *post*, which involves the same inquiry in another form.

But it is said that a restraint from Rochester to Buffalo, a distance of about 100 miles, is too large—that it is not confined to a particular place. The objection seems to take it for granted that a valid restraint cannot extend beyond a particular town or city. That is not the rule. A man cannot for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade, however limited may be the circle of its operation. But when a good reason appears for allowing the parties to contract, the restraint may extend far enough to afford a fair protection to the obligee. How far this will be, must depend in a great degree upon the nature of the trade or business to which the contract relates.

In *Davis v. Mason*, 5 D. & E. 118, the defendant agreed not to exercise the business of a surgeon, apothecary, and man-midwife within ten miles of *Thetford*, and judgment was given for the plaintiff, on a breach of the agreement. Lord *Kenyon* said, he did not see that the limits were necessarily unreasonable. He added, what is equally applicable in the case at bar—"neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practice as a surgeon in this town." In *Nobles v. Bates*, 7 Cow. 307, the restraint extended over a circle of 40 miles diameter, and was held good: and in *Hayward v. Young*, 2 Chitty's R. 407, a restraint of the like extent was upheld. In *Pierce v. Fuller*, 8 Mass. R. 223, an agreement not to run a stage between Boston and Providence; and in *Perkins v. Lyman*, 9 Mass. R. 522, a contract not to trade from Boston to the north west coast of

Chappel v. Brockway.

America for the period of seven years, were severally held unobjectionable. In *Bunn v. Guy*, 4 East, 190, a practicing attorney agreed to relinquish his business and recommend his clients to two other attorneys, and that he would not practice within a circle of 300 miles diameter, having London for its centre. This, though it certainly was a very large restraint—including a good deal of sea, as well as land—was nevertheless held valid. In *Horner v. Graves*, 7 Bing. 735, the defendant agreed not to practice as a surgeon-dentist within 100 miles of the city of York, where the plaintiff carried on that business; and this was held an unreasonable restraint, because it was larger than was necessary to afford a fair protection to the plaintiff in the enjoyment of his trade.

The last case to which I have referred gives the true rule on this subject, and is decisive of the question under consideration. The defendant sold out his business of running packet boats between Rochester and Buffalo; and that cannot be an unreasonable restraint, which is only co-extensive with the business which the defendant agreed to relinquish and the purchaser expected to acquire.

Neither the 10th nor the 11th plea contains any legal answer to the action. The principal merit of both seems to consist in ascribing a questionable motive to the plaintiff, or those for whom he is trustee, for entering into a contract which is apparently free from objection. In the 11th plea the defendant is not quite consistent with himself. He first complains of the competition which compelled him to carry passengers at half price; and then claims the right to break his contract for the purpose of again entering into the competition.

The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise. If we strike out this offensive word, little will remain, either of the pleas or of the argument, that was built upon them.

Chappel v. Brockway.

The 10th plea will then only amount in substance, to this : —the packet boat company purchased out the defendant for the purpose of bettering their own condition ; or, what amounts to the same thing, for the purpose of obtaining a better price for carrying passengers. Now this is nothing more than the usual motive for entering into such contracts, and we might as well declare them all void at once, as to give way to this objection. It does not necessarily follow that the public was injured, because the price for carrying was raised. The traveller has other interests at stake, beside that which immediately touches his pocket, and there may be such a thing as riding at too cheap a rate. Competition in business, though generally beneficial to the public, may be carried to such excess as to become an evil.

But it is enough that the contract is good upon its face, and the plea does not clearly prove that it was injurious to the public. In *Richardson v. Mellish*, 2 Bing. 229, one objection was that the contract was contrary to public policy, and *Best*, Ch. J. said, he was not much disposed to yield to such arguments, and he thought an unquestionable case should be made out before the courts would set aside a contract on that ground. And *Burrough*, J. protested against arguing too strongly upon public policy : he said, "it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law." There is force in this remark.

So far as the 11th plea raises the objection that the contract was against sound policy, it has been answered already. As to the residue of the plea, I hardly know what was intended, unless the defendant meant to make out that this was a case where he could have pleaded *non est factum*. But that is not his plea—on the contrary, he admits that the instrument is his deed. He does not allege duress, or any thing else going to the validity of the deed ; but his complaint is, if it amount even to so much, that he was driven to make the sale by a very active and powerful competition in business. Although this competition may have been injurious to him, it was not illegal. And as to the charge of *combination* and *confederacy*, having for its object a *mono-*

Chappel v. Brookway.

poly, the whole amounts to little more than a string of words, which are in bad repute, because they most commonly stand connected with bad acts. Fifty persons of great wealth and influence, as the plea alleges, combined together to run a line of packet boats, in opposition to the defendant's line—all which it was quite lawful for them to do. But they not only intended to run an opposition, but intended to carry passengers at half the fair price, and thus get away the defendant's business, unless he would also carry at half price; and this too was all lawful. The end at which they aimed in all this matter, was to get a monopoly of the business, so far as competition depended on the defendant. This brings us back again to the question of public policy, which has already been considered.

There is a class of cases where the contract, though apparently good on the face, is nevertheless tainted by its immediate connection with some illegal transaction. But I am unable to comprehend how a contract can be declared void, when the motive for making it was not illegal, and when it has neither led, nor was intended to lead, to any transgression of the law. If any danger to public interests can justly be apprehended from allowing many men of wealth and influence to associate as partners for the purpose of carrying on business; or if that competition which results from the enterprising character of our citizens and the active employment of capital ought to be regulated or restrained, it belongs to the legislature, and not the courts, to apply the proper remedy.

I see nothing in the pleas to change the character of the transaction, from what it appears to be on the face of the contract.

Judgment for plaintiff.*

* See next case.

Ross v. Sadgbeer.

ROSS vs. SADGBEER. -

A declaration on a bond, restraining the obligor from pursuing the business of a manufacturer of pot and pearl ashes, for a specified time and within prescribed limits, is *bad*, if it show no consideration for the giving of the bond by the obligor other than what is to be implied from the *seal* attached to the bond, and set forth no reason whatever why the bond was executed.

Ordinarily, where the parties contract by deed, a *consideration* will be implied from the *seal*; but that is not enough in cases of this kind. Here the party seeking to enforce the contract must show some good reason for its existence; as that it was given to protect him in the prosecution of a business, which for a proper consideration he had induced the other party to relinquish.

It seems that if the circumstances inducing a contract in restraint of trade do not appear upon the face of the instrument, that they may be averred in the declaration, and that thus the validity of the contract may be shown.

A contract in restraint of trade is, in legal presumption, void; and such presumption can be rebutted only by showing that it was entered into for good reasons, and the burden of showing the facts rendering the contract valid rests upon the party seeking to enforce it.

DEMURRER to declaration. The plaintiff declared in *debt* on bond, in the penal sum of \$2000, dated August 17, 1836, *conditioned* that the defendant should keep himself at all times entirely free and out of the business of *manufacturing pot or pearl ashes or soap*, or any art, trade or occupation requiring ashes or the consumption of ashes, &c. for the *term of ten years*, and *within forty miles of the village of Lockport*. The declaration set out the condition of the bond, and assigned breaches. The defendant *demurred to* the declaration.

M. T. Reynolds, for the defendant.

A. Taber, for the plaintiff.

By the Court, BRONSON, J. The objection is, that no sufficient consideration or good reason for making the bond, appears upon the face of it, and that none is alleged in the declaration. What has just been said in *Chappel v. Brockway*, will render it unnecessary to examine this question

Ross v. Sadgbeer.

much at large. In the celebrated case of *Mitchell v. Reynolds*, 1 P. Wms. 181, Ch. J. Parker concludes his elaborate argument in these words: "In all restraints of trade, *where nothing more appears*, the law presumes them bad; but if *the circumstances are set forth*, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained." In this I fully concur. The law starts with the presumption that the contract is void; and it is only by showing that there was an adequate consideration or good reason for entering into it, that the presumption can be destroyed. The rule is, not that a limited restraint is good, but that it *may* be good. It is valid when the restraint is reasonable; and the restraint is reasonable when it imposes no shackles upon one party which is not beneficial to the other. The facts which prove the restraint reasonable must in some way be made to appear; and as the presumption is against the party setting up the contract, it lies on him to remove the difficulty.

It is true that a consideration will be implied from the *seal*, where the parties contract by deed. *Livingston v. Tremper*, 4 Johns. R. 416. But the seal only imports that there was *some* consideration—not that there was a *peculiar* one, such as this case requires. If we imply a pecuniary consideration, however large it may be in amount, it will not remove the difficulty under which the plaintiff labors. It must appear that he purchased the defendant's works or a secret which he possessed in relation to the manufacturing of ashes, or that there was some other good reason for taking this bond. Otherwise, it was a contract to deprive a man of his livelihood, and the public of a useful member, without any benefit to the plaintiff, which the law will not permit.

The case of *Pierce v. Fuller*, 8 Mass. R. 223, which goes as far as any other I have met with in aid of the plaintiff, admits that "the consideration must always be shown, that the contract may be supported by the special circumstances which induced the making of it." See also *Palmer v. Stebbins*, 3 Pick. 188. In *Horner v. Ashford*, Bing. 322, the

Ross v. Sadgbeer.

contract was under seal, and the declaration stated that the defendant, *for the considerations in the deed mentioned, covenanted, &c.* The court held the declaration sufficient, saying, "it appears that the deed was for *some* consideration. The defendant should have craved oyer of the deed, if he meant to object to the sufficiency of the consideration, and not having done so, we are to presume that it contains a *legal* consideration." This case, as well as those in Massachusetts, virtually admit that the consideration which is implied from a seal is not sufficient to uphold such a contract, unless some further reason appears for entering into it.

A pecuniary consideration, whether expressed, or implied from the seal, may be sufficient to uphold the bond as a mere matter of contract. But something more is required where the parties stipulate for a restraint of trade. We must have the special circumstances which induced the contract.

Although it does not appear on the face of the contract that there was good reason for making it, the plaintiff may, I think, help out his case by proper averments in pleading. See *Mitchel v. Reynolds*, 1 P. Wms. 181; *Horner v. Ashford*, 3 Bing. 322. Such averments will not contradict the deed, because that expresses no consideration whatever; and if the special circumstances were such as will uphold the contract of the parties, I see no very good reason why the plaintiff should not be allowed to aver and prove them. The point seems never to have been directly adjudged, and perhaps we ought not to pass definitively upon it in a case where the question has not been discussed by the counsel.

It is enough that the declaration in its present form cannot be supported.

Judgment for defendant.*

* See the recent cases of *Hitchcock v. Coker*, 6 Adolph. & Ellis, 438; 33 Com. Law R. S. C.; and *Archer v. Marsh*, 6 Adolph. & Ellis, 959. 33 Com. Law R. 254.

GARDENIER *vs.* TUBBS and others.

Where property is bought at a sheriff's sale by the plaintiff in an execution and left in the possession of the defendant, without any good excuse shown, the sale is void as against other creditors of the defendant, notwithstanding that the plaintiff subsequently and before the levying of an execution on the part of other creditors, reduce the property to his actual possession. The sale thus being held void, the defendant in the execution is not a competent witness AGAINST the plaintiff in a subsequent controversy, between him and other creditors; though it seems he would be a competent witness FOR the plaintiff.

Where however the testimony of such witness was admitted, when called against the plaintiff, the court on a case made refused to grant a new trial, on account of the erroneous admission of such testimony, on the grounds that the defence was clearly sustained independent of such proof, and that there was no exception taken to the decision of the judge in admitting the testimony.

THIS was an action of *trover*, tried at the Montgomery circuit in May, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

The suit was brought for the taking by the defendants of a yoke of oxen and other property, purchased by the plaintiff at a sale of the property of one B. Whitcomb, on the eighth day of August, 1837. Whitcomb's property was sold by virtue of an execution, in favor of the now plaintiff, for \$189 93, and of two justices' executions in favor of other persons, for \$13 60. The property after the sale was left in the possession of Whitcomb, until the twenty-first day of August, when the plaintiff took possession thereof. On the twenty-second day of August, it was levied upon by Combes, one of the defendants in this cause, as a deputy sheriff, by virtue of an execution in favor of Tubbs and Cronkhite, two others of the defendants, against B. Whitcomb, issued on a judgment confessed by Whitcomb, on 22d August, in favor of Tubbs and Cronkhite, for \$53 18 damages, and \$13 15 costs: the action in which the judgment was confessed was commenced by the filing of a declaration on the 18th August, and on the 29th August, the property thus levied upon was sold by Combes. The defendants called as a witness

Gardenier v. Tubbs.

one *Philip P. Graff*, whose testimony went to prove that previous to the sale of Whitcomb's property, on the *eighth* of August, 1837, it was agreed between the plaintiff and Whitcomb, that the property should be bought in by the plaintiff, and left in the possession of Whitcomb, to give the latter an opportunity to dispose of it, and whatever it should bring more than the plaintiff's debt, Whitcomb should retain. The defendants also produced in evidence the testimony of Whitcomb, taken under a commission. Whitcomb testified that the plaintiff bought in his property for between \$175 and \$200, which was worth upwards of \$300, and he confirmed the testimony of *Graff*, in reference to the agreement between the plaintiff and himself, as to his right to *dispose* of the property. The plaintiff offered to contradict by proof, some of the statements made by Whitcomb: which offer was rejected and the proof refused to be received. The judge charged the jury that a sale of property under an execution was *void* if the property was bought in by the plaintiff, and left in the possession of the defendant in the execution, unless some good excuse was shown for so leaving it; that no such excuse had been shown in this case; and that the subsequent removal of the property on the day preceding the levy under the defendant's execution, did not remove the presumption of fraud, and that the defendants were entitled to a verdict. The jury found accordingly. The plaintiff, on a *case* made, moved for a new trial.

M. T. Reynolds, for the plaintiff, insisted that the plaintiff had not lost his right to the property, by leaving it in the possession of the defendant in the execution for a few days after the sale, inasmuch as he removed it, and took the actual possession thereof, previous to any rights attaching on the part of other creditors. He also contended that the evidence of *Whitcomb* ought not to have been received, he being an incompetent witness, as against the plaintiff.

S. Stevens, for the defendants.

By the Court, COWEN, J. Several exceptions seem to have been taken at the trial; but no bill of exceptions was

Gardenier v. Tubbs.

sealed, and the matter comes before us on a *case*. The fraud was completely established, independent of Whitcomb's deposition. The possession after sale, especially when fortified by the agreed trust, for Whitcomb's benefit, as proved by Philip P. Graff, fully authorized the judge to direct a verdict for the defendants.

We must therefore deny a new trial, although we think that *Whitcomb* was interested, and that his deposition should have been excluded. As between him and the plaintiff, the sale was valid, and the executions therefore were satisfied and must continue to be so considered, notwithstanding the plaintiff's failure to sustain the sale to him. The same property is, by the second sale, made to pay other creditors of Whitcomb, whereas had the first been sustained, it would have paid but the set of executions under which it was made. This double payment, Whitcomb was interested to promote. The first sale was executed, and the plaintiff can never allege his own fraud to avoid it, and thus revive his claim. It binds the same as if it had been an ordinary conventional sale to him, for the purpose of defrauding creditors, in which case, though the vendor would be a competent witness for him, he would clearly be incompetent for the creditor who should seek to avoid the sale. *Rea v. Smith* 19 Wendell, 293. In the last case there is no balance of interest with the vendor, for he is not liable in respect to a failure of title by reason of the fraud. Both parties admit his title and claim through him; and mutual fraud is the only question. This the law never will recognize as a ground of relief, either one way or the other, as between the parties to it. It will neither enforce nor annul a contract mutually fraudulent. Therefore where the vendor is called for the vendee, he is receivable on the ground of an interest, to testify in favor of the creditor. His interest all lies that way. By sustaining the creditor's claim, he pays his own debt without fear of any consequences on the other side injurious to himself. Such is the case of interest which the creditor is put to encounter when he offers his debtor as a witness, to impeach his own fraudulent sale to another. Failing to maintain the defence, the judgment

Petrie v. Feeter.

debt revives, and a new execution may go against the debtor. To make him competent, therefore, he must be released from such consequence.

The proof that Whitcomb had offered the joint note of the *Graffs* to the plaintiff, and that he did not communicate to Philip P. Graff the agreement with the plaintiff, was properly excluded. As independent proof, it was totally irrelevant; and if intended as a contradiction of Whitcomb's account in respect to the same matter, it was inadmissible as going to impeach him in a matter wholly immaterial to the issue between the parties.

The judge erred in receiving Whitcomb's deposition; but the question coming here on a *case*, and there being in fact no exception taken to the decision of the judge in this respect, and the defence being clearly sustained independent of the deposition, a new trial is denied.

New trial denied.

PETRIE vs. FEETER.

Where the maker of a note on its being presented to him by a person about to take a transfer of it, acknowledges himself to be *holden for its payment* and the note is purchased for value, and the maker subsequently makes a payment upon it, he cannot afterwards sue to *recover back the money* thus paid, although he shows that he signed the note merely as *surety*, that it was paid by the *principal*, that it was *over due* at the time of the transfer, and that he made the acknowledgment of his liability in *ignorance of the payment* by the principal.

THIS was an action of *assumpsit*, tried at the Herkimer circuit, in November, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The suit was brought to *recover back money paid* under the following circumstances: On 27th April, 1829, the plaintiff *John D. Petrie* signed a note as surety for *Adam Petrie*, payable to John Graves or *bearer*, for the sum of \$554 95. The note was given to *Daniel Dygert* a deputy of John Graves, who was then sheriff of the county of Herkimer, in payment of certain property purchased by Adam

Petrie v. Fester.

Petrie at sheriff's sale, and who agreed that whatever sum should be paid by Adam Petrie to *Jewett & Halsey* a mercantile firm in New York, for whose benefit the note was taken, should be credited upon this note. On 7th July, 1829, Adam Petrie paid to Jewett & Halsey \$335 50, and transferred to them a note for \$101 99, which was duly paid on 20th January, 1832; and on 1st May, 1832, *Jewett & Halsey* received the balance of the demand due to them, for the payment of which the above note of \$554 95 was taken. Adam Petrie died in July or August, 1829. In the month of October, 1831, *Dygert* offered to sell the note of \$554 95 to the defendant, who declined to purchase it without the consent of John D. Petrie. After this, Petrie called upon the defendant, and told him that he was willing that he should purchase the note; *that he was as willing to pay the money to him as any other man*; that he had signed the note and *was holden to pay it*. Upon this the defendant bought the note of *Dygert*, paid him \$218 in cash, and passed the residue to his credit on account. On the 18th October, 1831, Petrie gave his note to the defendant for \$250, payable in four months at the Branch Bank at Utica, which when due was paid by Petrie. This note was endorsed upon the note for \$554 95. The plaintiff upon the above state of facts claimed *to recover back* from the defendant the \$250 paid by him as above, and the interest thereof. The judge ruled that he was entitled to recover, and the jury under the direction of the judge found a verdict for the plaintiff. The defendant asks a new trial.

M. T. Reynolds, for the defendant.

D. Burwell & J. A. Spencer, for the plaintiff.

By the Court, NELSON, Ch. J. I am unable to discover any principle that will justify the ruling of the learned judge at the circuit, unless the defendant is implicated in the *fraud* of *Dygert*, of which I see no evidence—none, certainly, which would warrant the conclusion as matter of law. To sustain a verdict in this case upon that ground, the point should have been found by the jury.

Petrie v. Feeter.

It is true the note was *over due*, but the defendant, before he took it, first consulted one of the makers, and purchased upon the faith of his statement; and the very payment now sought to be recovered back was made at the time.

Feeter advanced to Dygert, upon the strength of the note thus purchased, \$218 in cash; and in the absence of bad faith, his equity to this amount is as strong and even stronger than the plaintiff's, who was acting under a mistake, because the defendant trusted to his representations that the note was a valid security. When the plaintiff urges that he was deceived by Dygert, the defendant may reply that he would also have been deceived, had he not taken the precaution to obtain his assent to the purchase. It is not for him now to retract, and shift the loss upon one who has acted under his advice. At most, the plaintiff could only be entitled to the difference between the two sums received and advanced by Feeter upon the note. But I do not see how any part of the payment can be recovered back.

Admitting that the note was received beyond the \$218 for a *precedent debt*, the farthest the court has gone, where a note has been negotiated in *fraud of the maker*, is to allow the fact to be set up by way of *defence*. No case has been referred to where a suit has been sustained to recover back money paid by the maker in such a case, and, I venture to say, none can be found.

It is true the case is distinguishable from that class of cases, in this: that here *the fraud* upon the plaintiff in the negotiation was not discovered till after the payment. But *that* is his misfortune, and no fault of the defendant. This matter, when allowed by way of defence, stands upon a consideration of the equities existing between the parties; but I think it would be carrying them too far, and beyond the foundation and reason of the rule, to permit them to be turned into a *legal right*, upon which a suit may be sustained to recover back the money when paid.

New trial granted, costs to abide event.*

* See *Watson's ex'rs v. M'Laren*, 19 Wendell, 563, and the cases there cited, in support of the principal position in this case, that the maker is bound by his declaration that he was holden for the payment of the note.

Yale v. Coddington.

YALE & HENSHAW vs. CODDINGTON.

Where goods are to be paid for in a note or bill, the *vendor* cannot recover on the common count for *goods sold and delivered* until the *credit has expired*, but he may proceed immediately for a breach of the special agreement.

A judgment entered on a report of referees, where a plea was interposed which required a *replication*, and it did not appear by the *record* that a replication had been put in, was held to be *erroneous* and not cured by the statute of amendments. The statute cures defects and omissions in matters of *form*, but not those of *substance*.

Where, as was done in this case, it is suggested on the argument that there was in fact a replication put in, the court will suspend pronouncing judgment, to give the plaintiff below an opportunity to apply to amend his record, which will be granted on payment of the costs of the writ of error and of the motion, and giving leave to the plaintiff in error to discontinue without costs.

ERROR from the superior court of the city of New York. The action below was brought by *Coddington* against *Yale* and *Henshaw*. In addition to the general indebitatus counts in assumpsit, the declaration contained several counts on a special contract, by which the plaintiff sold certain goods to the defendants, to be paid for on delivery by their note at *four months*. Breach, that although the goods were delivered, the defendants refused to give their note in pursuance of the promise. The defendants pleaded in abatement that another action was depending for the same cause in the superior court. Immediately after setting forth the plea, and without any replication, the *record* states that the cause was referred to three referees, who reported that there was no other action depending for the same cause, and that the sum of \$619 22 was due from the defendants to the plaintiff. It does not appear that the defendants had any thing to do with the order for a reference, or that they appeared before the referees. Judgment was rendered for the plaintiff on the report, and the defendants now bring error.

J. L. Wendell, for plaintiffs in error.

M. T. Reynolds, for defendant in error.

Yale v. Coddington.

By the Court, BRONSON, J. The special as well as the general counts are in *assumpsit*, and there is no foundation for the objection that there has been a misjoinder of counts. This is also an answer to the objection that actions for torts cannot be referred.

The plaintiff below has counted on the special agreement, alleging for breach that the defendants refused to give their note in pursuance of the promise. This shows a good cause of action, although the *credit* of four months had not expired at the time the suit was commenced. Where goods are to be paid for in a note or bill, the vendor cannot recover on the common count for goods sold and delivered until the credit has expired, but he may proceed immediately for a breach of the special agreement. *Mussen v. Price*, 4 East, 147. *Hoskins v. Duperoy*, 9 id. 498. *Dutton v. Solomonson*, 3 Bos. & Pull. 582. The cases of *Lupin v. Marie*, 6 Wendell, 77, and *Furniss v. Hone*, 8 id. 247, which were cited before the defendants below, only prove that the property in goods will pass to the vendee, where the vendor makes an unconditional delivery, without receiving the payment or security which he had a right to demand. They are very far from proving that the vendor may not have an action on the special contract as soon as it is broken by the vendee.

So far as appears by the record, there was no replication to the plea, and no issue of any kind was joined between the parties. There was, consequently, no authority to order a reference of the cause, 2 R. S. 334, § 39, or to render judgment against the defendants. This is a fatal error. A verdict will aid an informal, though it will not help an immaterial issue. Bull. N. P. 320. 2 Saund. 310, n. 6. It has never been supposed that a verdict could cure the total want of an issue. Until the parties have come to an affirmative and negative in some form, there is nothing to be tried.

The language of the statute of amendments underwent some alterations in the late revision of the laws. 2 R. S. 424, and p. 601, § 60. But we have the means of knowing that, with very few exceptions, it was not intended to make new provisions, but only to re-enact the old law as it had

Yale v. Coddington.

been expounded by the courts. The statute cures defects and omissions in matters of *form*, not those of *substance*. In *Reed v. Drake*, 7 Wendell, 345, the judgment was reversed because breaches were not assigned in the declaration. The defect was held not to be amendable, although it appeared that the right of the matter had been tried between the parties. In *Pike v. Gandall*, 9 Wendell, 153, 4, it appeared by the record that the default for not pleading was entered before suit brought. Although the court had no doubt that this was a clerical mistake, it was strongly intimated, though not necessarily decided, that the error was fatal. In *Waldon v. Green*, 4 Wendell, 409, the judgment was reversed, because a *nolle prosequi* on the common counts, which had been ordered by the court, below, had not been entered on the record. These are stronger cases than the one at bar.

Although this is not a mere formal defect which we can overlook, yet if there was in fact a replication taking issue on the plea, as was suggested on the argument, the record may, I think, be amended, so as to save the judgment. But this can only be done on motion, and on proof that issue was in fact joined. *Pike v. Gandall*, 9 Wendell, 154. In cases coming within the healing influence of the statute, the amendment is never actually made, but the defect or omission is overlooked and disregarded. This rule applies where the court cannot but see from the record, that right has been done, although there has been some informality in the pleadings or proceedings of the parties. But where there is a total defect of pleading, or in any other matter of substance, the case does not fall within the statute; the court cannot see that right has been done, and the omission can only be cured by an amendment actually made. An order for the amendment will only be granted on motion, after notice to the opposite party, and upon such terms as justice may require. In this case the terms should be, payment of costs of the motion and of the writ of error, and allowing the plaintiffs in error to dismiss their writ without costs. Nothing short of this will be doing justice to them.

Downing v. Ruger.

I think the case should be allowed to stand over until the next term, to give the defendant in error an opportunity to move for an amendment. If no motion shall be made, or if made and not granted, the judgment will be reversed.

Ordered accordingly.

DOWNING vs. RUGER.

In the exercise of a *public* as well as *private* authority, whether it be *ministerial* or *judicial*, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is *public*, and the number be such as to admit of a *majority*, such majority will bind the *minority* after all have duly met and conferred.

Where the authority is conferred upon *two*, nothing can be done without the consent of *both*; yet where the authority is *public*, to prevent a failure of justice or injury to the public, one may act without the other: as if one be dead, or interested, or absent. Upon this principle, one of two *overseers of the poor* is authorized to institute and carry on proceedings for the seizure of the property of one who has absconded, leaving his wife or child chargeable to the town. At all events, where only one overseer acts, the *consent of the other will be presumed*, upon the presumption in favor of the performance of official duty, that he had been conferred with and consulted as to the proceedings to be had.

So strong is the presumption in favor of the performance of official duty, that it always prevails, unless it be shown to be otherwise by direct and positive proof, coming from the mouths of witnesses whose relation to the transaction enables them to put a *direct negative* upon the presumption: thus in this case it was held, that the *presumption of consent* could be rebutted only by the testimony of the *other overseer*.

It seems that if the inhabitants of a town at their annual town meeting, were to elect but *one* instead of *two* overseers of the poor, that the one elected would have no authority to act for the want of a colleague; but that it would be otherwise if *two* were elected, and one should die or become disqualified.

On an application for a warrant against a person said to have absconded, leaving his wife or children chargeable to the public, the *wife* of such person is not a competent witness to prove the fact; but if a warrant be granted upon *her testimony*, the proceeding is *not void*, it is *voidable* only, and a protection to all persons acting under its authority, although actors in the obtaining the warrant.

THIS was an action of *trover*, tried at the Yates circuit, in June, 1838, before the Hon. DANIEL MOSELEY, one of the circuit judges.

Downing v. Ruger.

The suit was brought for the taking of a horse. The defendant justified the taking as an *overseer of the poor*, by virtue of a warrant issued by two justices, on a complaint made to them by the overseers of the poor of the town of Potter, in the county of Yates, that the plaintiff had *absconded*, leaving his wife and child chargeable or likely to become chargeable to the public for support. The warrant, issued 15th January, 1838, after reciting the complaint, authorized the overseers of the poor of the town of Potter to seize and take the goods and chattels, &c., of the plaintiff, make an inventory thereof, and return the same with their proceedings in the matter to the next court of general sessions. By virtue of this process, the *defendant* seized the horse in question, together with other property, made an inventory, returned the warrant, &c., and the court of general sessions, by rule, confirmed the proceedings. On the part of the plaintiff, it was shown that the *only witness* sworn in support of the complaint made to the magistrates, was the *wife* of the plaintiff; and that the application for the warrant and all the other proceedings in the matter, were had by the *defendant* alone, *no other overseer* of the poor uniting with him in the matter: one of the magistrates, however, stated that he did not know whether there was *any other overseer* of the poor of the town of Potter, at the period of those proceedings, besides the defendant. On showing these facts, the plaintiff insisted that the evidence offered by the defendant should be *excluded from the consideration of the jury*. The judge ruled that the evidence was proper to be submitted to the jury. The plaintiff then proved a *resolution* of the board of supervisors of the county of Yates, passed in 1831, abolishing the distinction between *town* and *county* poor; and that since that period the poor of the *county* had been supported under the management and direction of *county superintendents of the poor*; but failed to prove that the determination of the supervisors had been *filed with the county clerk*, 1 R. S. 629, § 28, 2d ed. The plaintiff renewed his objections to the evidence produced by the defendant, contending that it was now apparent that the defendant had failed to make out a justifica-

Downing v. Rugar.

tion ; that the distinction between *town* and *county* poor having been abolished, the duties of *overseers of the poor* of the several towns in cases of this kind were transferred to the *county superintendents*, and that therefore the whole proceedings on the part of the defendant were *coram non judice*. This objection was again overruled by the judge, who amongst other things charged the jury that he was inclined to the opinion that the defendant was justified by the warrant ; and if, *from the evidence given on the trial*, they were not satisfied that the board of supervisors of the county had abolished the distinction between town and county poor, they were authorized to find that the *overseers of the poor* still retained and had jurisdiction of the *subject matter* of the complaint upon which the warrant had issued. The jury found for the defendant. The plaintiff asks for a new trial.

S. Stevens, for the plaintiff. The distinction between *town* and *county* poor, was abolished in the county of Yates, in 1831, and the duties formerly incumbent upon *overseers of the poor* in cases of this kind, devolved upon the *superintendents of the poor*, 1 R. S. 624, 625, § 8, 13, and who have ever since discharged those duties. The adoption of this new mode of conducting matters relating to the poor, depends upon the *determination* of the supervisors, and not upon the fact of the *evidence* of their determination being filed in the county clerk's office ; the statute as to the filing of the certificate is merely *directory*, and the omission to file it cannot have the effect to defeat the determination of the supervisors. If this be so, then the *overseers of the poor* had no authority to act in the matter. But if they had authority, *both* the overseers of the poor of the town should have united in the proceedings had against the plaintiff. The statute requires that there shall be *two overseers of the poor* elected in each town, and the power to act in cases of this kind is given to the *overseers*, that is, to *both*, and not to one of them. Where a power is given to *two* persons, as there can be no majority, both must concur in any proceedings had under the power conferred. Here it was shown

Downing v. Ruger.

that the defendant acted *alone*, and that the other overseer did not unite in what he did. Again : The defendant is not protected by the warrant, as it issued upon insufficient evidence. The wife of the plaintiff was not a competent witness against her husband, and the defendant cannot shelter himself under the warrant, as he was *an actor* in the whole transaction, and thus fully aware of the illegality of the proceedings. 6 Cowen, 234. 3 id. 206. 9 Johns. R. 75.

D. B. Prosser, for the defendant. The plaintiff failed to prove that the distinction between *town* and *county* poor was abolished in *Yates*; the question was submitted to the jury upon the evidence before them, and their verdict is conclusive. Admitting that there were *two overseers* of the poor of the town of Potter, at the time when those proceedings were had, it was not necessary that both should be *actors*. The act to be done was merely *ministerial*, and could as well be performed by one as both. 3 T. R. 38. Id. 380. The defendant is protected by the warrant of the magistrates who acted *judicially*, and if they erred in taking the testimony of the plaintiff's wife, their proceedings are not *void*; they are *voidable* merely, and are a full protection to the defendant, although an actor in the transaction. 10 Johns. R. 167. 11 id. 150, 114. 17 id. 145. 2 Strange, 710. 5 Wendell, 170. 6 id. 597. 16 id. 514. As to the right to take the testimony of the plaintiff's wife, the counsel cited 18 Wendell, 637, 10 Vesey, 56.

By the Court, COWEN, J. The jury found, under the charge of the judge, that the distinction between town and county poor had not been abolished in the county of *Yates*, and the only questions presented by this case are, 1. Whether the proceeding was void for want of action by two overseers; and if not, then 2. Whether it was void because the plaintiff's wife was the sole witness before the justices.

1. The statute requires each town to elect two overseers. 1 R. S. 332, § 4. I therefore think, till the contrary be shown, we must intend there were two in the town of Potter. Besides, it is quite doubtful whether, if there be not

Downing v Ruger.

two, any act whatever can be done as overseer by the other. Should the town omit to choose the requisite number, they would not pursue the statute authority; though if one should die or be disqualified, it would seem that the other might then act alone. 14 Vin. Abr. Joint and Several, (B), pl. 1. 45 Ass. pl. 3. Jenk. 40, case 76. Though otherwise of judicial officers. *Auditor Curle's case*, 11 Rep. 2. Jenk. 40, case 76.

The statute under which the defendant proceeded, 1 R. S. 624, § 8 to 10, provides that when a father, &c. shall abscond, leaving his wife or children chargeable, to any town, or likely to become so, the *overseers* may apply to any two justices, who, upon *due proof*, may issue their warrant authorizing the *overseers* to seize his goods. By virtue of this warrant the *overseers* may seize the goods and be vested thereby with all the owner's right. The *overseers* shall make an inventory, and return it, together with their proceedings to the next general sessions, there to be filed; and the court may confirm the warrant and seizure, or discharge the same. The statute in terms confers a joint authority; and, containing no express provision that each of the overseers may proceed separately, it is objected that all is void here for want of jurisdiction, because it did not appear affirmatively that both of them actually joined in the complaint and subsequent proceedings. The rule seems to be well established, that in the exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred. *Green v. Miller*, 6 Johns. R. 39, 41. *Grindley v. Barker*, 1 Bos. & Pull. 236. 2 R. S. 458, § 27, 2d ed. 3 id. 780, note, § 44, referring to 6 Johns. R. 39. *Rex v. Beeston*, 3 T. R. 592, 594. It follows, that where there are only two, nothing can be done without the consent of both. And this has been held as a general rule where a county has two coroners or sheriffs. 6 Vin. Abr. Coroner,

Downing v. Ruger.

(H), pl. 14 Vin. *ut supra*. *Rex v. Warrington*, 1 Salk. 152. Yet, there are authorities which hold clearly, that to prevent a failure of justice, one may act alone without consulting the other; as if one be dead, or interested, or absent, where it is necessary to make an immediate arrest. All this may be collected from *Viner* and *Salkeld*, before cited, to which may be added *Naylor v. Sharpless*, 2 Mod. 23; and see *Auditor Curle's case*, 11 Rep. 2. and *Rich v. Player*, 2 Show. 286. I should infer, from these authorities, that one overseer alone might at his pleasure make a seizure of the goods.

But admitting that it were necessary they should act jointly throughout, and that should one act without the assent of the other, all would be void, the warrant here *on its face* appears to be regular. It recites the application as being made by both; and it being the duty of the acting overseer not to proceed without obtaining the other's consent, I think we are bound strongly to presume that such consent was obtained. It cannot be necessary that both should be corporally present. The duty is strictly ministerial, and one may act alone as the agent or deputy of both, with the other's consent. Ministerial officers may, in general, depute their powers to one another or to a third person. *Tomlins' Law Dict.*, Deputy. Can there be a doubt, that overseers of the poor, in prosecuting under the excise law, or otherwise appearing as parties, may make an attorney? So of various other municipal officers. This right has never been questioned, nor that they may delegate all their authority to one of their body to act as attorney. The delegation need not be in writing; it is good, though merely oral. *Gaul v. Groat*, 1 Cowen, 113. *Tallock v. Cunningham*, id. 256. It is very common for such officers and others, acting as commissioners under various statutes, not only to delegate in particular instances, but to agree generally, that one of the board shall act in behalf of the whole in the execution of whatever measure they may resolve on. This is convenient, and it is many times impossible that ministerial duties should be executed without the employment of agents or deputies. The law allows it in respect to such

Downing v. Rugar.

convenience, always holding the officers themselves accountable for the acts of their agents ; of this, various instances are put in the *Earl of Shrewsbury's case*, 9 Rep. 48, 49. It being the duty of the overseers to act jointly, and they having power thus to act by one of their body in the mere execution of their resolves ; and such too being the common course of business, which is convenient and many times absolutely necessary, a very strong intendment arises when one comes to act for all, that he has done his duty by conferring with his companions, and obtaining the requisite power.

There is also another principle on which the assent of the other overseer should be presumed. The case was a fit one for prosecution, and the suit beneficial to the town represented by the overseers. It has been often held, that any of the principles mentioned authorize a presumption that the party charged with a neglect of duty proceeded regularly. This presumption prevails till the contrary be clearly shown. One instance of presumption from official duty, is a constable being sued for making an arrest on execution without first searching for property. He shall be presumed to have made due search, and the plaintiff be put to prove the negative. *Barhydt v. Valk*, 12 Wendell, 145, 6. The cases are numerous under all the heads of presumption I have mentioned, and too familiar to need citation. It was said by Bayley and Littledale, justices, in *Bailey v. Culverwell*, 8 Barn. & Cress. 448, that where an act is for the benefit of the party, though it be done by another without any apparent authority, a subsequent assent is sufficient, and shall be presumed. Can there be a doubt of this? Suppose one of two overseers of the poor receives money due to the poor fund, who would hesitate to presume that the other would assent to the payment?

The presumptions of which I have spoken, especially those arising from official duty, are very strong ; and that the duty was not performed must be shown by calling those whose relation to the transaction can put a direct negative upon it, unless their absence be accounted for. This was distinctly held in *Williams v. The East India Company*, 3

Downing v. Ruger.

East, 192, wherein it was sought to charge the company because their officer had neglected to give notice to the plaintiff's chief mate, that certain combustibles laden by the defendants on board the plaintiff's ship were of such a character as to endanger its safety. The court presumed that the defendant's officer had given notice; and the chief mate being dead, it was held essential to produce the officer himself who delivered the materials—for want of which the plaintiff was nonsuited. Proof by the captain and second mate that they had no notice, was held to be merely circumstantial, and therefore insufficient.

In the case at bar, if the absent overseer had not given his consent and authority to proceed, he alone could say so; and I think it due to the defendant and the general safety of this kind of officers to presume they proceeded regularly, till the best sources of information are exhausted. The other overseer was a competent witness; and in his absence it was right at the circuit to regard the defendant as properly acting for both. Had the other been dead or his absence otherwise accounted for, the circumstances might have been sufficient to negative the proper authority till it was shown affirmatively. As the case stands, nothing was shown which is necessarily inconsistent with the assent of the other overseer. The proof establishes merely that he did not appear in the matter personally.

The process then must be taken to have been regularly sued out so far as authority was concerned. The seizure of the plaintiff's goods was consequently lawful, unless the proceeding be otherwise impeachable; and though the return to the general sessions should regularly have been in the name of both overseers, the omission is but an informality, which, after jurisdiction properly acquired, cannot be objected, in this collateral action. It was but a clerical error, which might have been amended on motion so as to speak according to the legal effect of the seizure.

Next it is objected that the wife was an incompetent witness; and that the warrant was taken out on her testimony alone, there was a want of jurisdiction. But according to *Van Steenberg v. Kortz*, 10 Johns. R. 167, the admission

Stowits v. Bank of Troy.

of improper proof is a mere error of the magistrate; and cannot be objected as rendering the proceeding void.

New trial denied,

STOWITS vs. BANK OF TROY.

In an action against a *bank* for the non-payment of its notes, where the plaintiff demands *ten per cent. interest* by way of penalty, it is not necessary to warrant proof of the presentment of the bills and refusal to pay, that those facts should be *specially averred* in the declaration; the evidence is admissible under the *common money counts*.

A *bill of particulars* in such case, setting forth copies of the notes, although not technically correct, will suffice, inasmuch as it apprises the defendants of the grounds of the plaintiff's claim.

ERROR from the mayor's court of the city of Troy. The plaintiff declared on the common money counts, and in pursuance of an order for that purpose, furnished a *bill of particulars*, in these words: "you will please to take notice that the nine promissory notes, commonly called bank notes, of which the following are copies, constitute the *particulars* of the plaintiff's demand for which the above suit is brought. (The plaintiff then set forth *verbatim et literatim* the copies of *nine bank bills*, issued by the defendants of *five dollars* each, payable to A. B. or bearer, *on demand*, and concluded as follows:) "The plaintiff will also claim to recover *interest* on the promissory notes above set forth, *at and after the rate of ten per cent.* from the eleventh day of August, 1837." The defendants pleaded *non assumpsit*. On the trial of the cause, the plaintiff offered to prove that on the 11th August, 1837, he *presented* nine bank bills, as described in the bill of particulars, to the cashier of the Troy Bank, at their banking house, at 12 o'clock at noon, and *demand*ed payment in *specie*, and that payment was refused; and also offered to prove that the said bank bills or notes were issued by the Troy Bank. The counsel for the defendants *objected* to such proof; 1. Because *presentment of the bills and non-payment thereof were not specially*

Stowits v. Bank of Troy.

averred in the declaration ; and 2. That under the bill of particulars as presented, the plaintiff was entitled to recover only *the notes* themselves, provided he had suitable counts for that purpose, but could not give them in evidence as proof of the consideration of any cause of action set forth in the counts ; and he could not recover upon the notes for the want of necessary counts. The *recorder* sustained the second objection, and *nonsuited* the plaintiff, who sued out a writ of error.

J. Koon & M. T. Reynolds, for the plaintiff.

D. Buel, jun., for the defendants. A note payable *on demand*, must be demanded before suit brought. Burr. 1516. The presentment and non-payment could not be proved, not being *specially* averred. 18 Johns. R. 341. Nor could the plaintiff recover on the common counts, not having stated in the particulars of his demand the *consideration* of the notes, &c. Chitty on Bills, p. 592, 3. ed. of 1836.

By the Court, NELSON, Ch. J. The first question has, in effect, been heretofore disposed of by the court. The plaintiff is not entitled to charge for special counts in taxation of costs, for the reason that the common counts are all that can be deemed necessary. 19 Wendell, 113. This has been the practice for more than twenty years ; after which we cannot consistently require the insertion of them for the sake of setting forth specially a *demand* and *refusal* at the place of payment. A defendant will not thereby suffer, as the same proof must be given to authorize a recovery, as if the notes had been specially counted upon ; and by calling for particulars of the action, he can always ascertain in due time, that the proof will become material, and be prepared to meet it. The case of *Smith v. Smith*, 2 Johns. R. 235, shows that the proof of special matters beyond the mere execution of the notes, preliminarily to the introduction of them under the money counts, affords no solid objection to the practice.

The bill of particulars, I think, sufficiently explicit, as it fully apprised the defendants of the grounds of the plaintiff's

Barnes v. Cole.

claim; indeed, nothing short of some description of the notes would have complied with the rule of practice. The form is not technically exact, such as simply giving the copies of notes, instead of saying so much money, \$50, for instance, due upon them, describing them; but the substance is in the bill, and no one could be misled.

Judgment reversed; *venire de novo* from the mayor's court; costs to abide the event.

BARNES vs. COLE & FITZHUGH.

In an action on the case against the owners of a steamboat, for negligence in the navigating of the vessel, whereby the plaintiff was injured, the *steersman* of the boat is a competent witness for the defendant, if it appear that he acted under the immediate direction of the master of the boat.

In such action, the plaintiff is not entitled to recover, if the injury is in any degree attributable to his own want of care; and where such is the fact, and he obtains a verdict, a new trial will be granted.

THIS was an action on the *case*, for negligently running down the plaintiff's *scow*, tried at the Onondaga circuit, in April, 1836, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The plaintiff's scow lay at a dock or wharf in the Oswego river, at the village of Oswego, with the stern projecting westward beyond the end of the wharf from 8 to 16 feet into the river, at a place where the channel was narrow, and only from 50 to 70 feet wide. The defendants were owners of the steamboat *William Avery*, commanded by Capt. *Read*, and while in coming into the river from Lake Ontario, struck that part of the boat which projected beyond the wharf, and did the injury complained of. The accident happened in the night time, and the night was dark and foggy. One or two of the plaintiff's witnesses swore the scow had a light burning when they went to bed, but they could not say there was a light when the accident happened. All the defendant's witnesses agreed there was no light in the scow. Most of the witnesses said they had never known a boat or vessel to lie on the west side of the

Barnes v. Cole.

wharf, in the narrow channel in the night time; but some of the plaintiff's witnesses said they had known boats or vessels to lie there at night. Captain Read was in the immediate command of the boat at the time; he was on the promenade deck by the bell ropes; he was near the steersman, and acted as pilot. Immediately on discovering the scow, the bell was rung and the engine stopped, but the headway of the boat carried her against the scow. David McSwain was the steersman of the boat at the time, and being offered as a witness for the defendants, was rejected by the judge, on the ground that, being *steersman*, he was not a competent witness. The jury found a verdict for the plaintiff, and the defendants move for a new trial.

J. A. Spencer, for defendants.

B. Davis Noxon, for plaintiff.

By the Court, BRONSON, J. Was McSwain properly excluded as a witness? He was at the helm at the time the accident happened; but the captain of the steamboat was at his side, acting as pilot. So far as appears, the steersman did nothing more than discharge his duty in obedience to the orders of his superior. If there was negligence anywhere, there was no evidence to show that he in particular was chargeable with it. Indeed upon the evidence, he must be taken to have acted in obedience to the orders of the master. Under such circumstances, it would be the master, and not the steersman, who would be liable to the defendants, who were the owners, in case of a recovery against them, and clearly the steersman could not be answerable to the captain for obeying his commands. It seems impossible then to maintain that the witness was interested. The case falls within the principle decided in *Noble & Palmer v. Paddock*, 19 Wendell, 456. That was an action against the captain, who was in the immediate command of his boat at the time of the accident, and in the absence of any proof to charge the injury upon the steersman, he was held to be a competent witness for the defend-

 McArthur v. Sears.

ant. The cases were there reviewed by the Chief Justice, and I need not, therefore, refer to them. The witness was improperly rejected.

The verdict was also, I think, plainly against the weight of evidence. I do not see how the plaintiff could escape the charge of having to some extent contributed to bring the misfortune upon himself, by leaving his boat in an improper situation.

New trial granted.

MCARTHUR & HURLBERT vs. SEARS.

In an action against the owners of a steamboat as *common carriers*, where the boat stranded in entering a harbor in the night time, in consequence of the master mistaking a light upon a stranded vessel for a light usually exhibited by the keeper of the beacon light, by means whereof the plaintiffs sustained damage; it was held, that nothing will excuse the *common carrier*, except the two ordinary excepted cases; *inevitable accident without the intervention of man*, and *the acts of public enemies*; that neither of the exceptions existed in this case; and that proof of the utmost vigilance and care on the part of the master was irrelevant and inadmissible in defence of the action.

The rule of law is the same in respect to a *carrier by water* as to a *carrier by land*; nor is there any distinction whether the navigation be upon the *ordinary rivers*, or the *great rivers and lakes* or *inland seas* of this country, except so far as the exceptions in favor of the carrier are extended to the *perils or dangers of the rivers or lakes*, by the special terms of the contract contained in the charter party or bill of lading.

The clause, "except the perils or dangers of the rivers or lakes," and various cases arising under it, cited, considered and commented upon.

Where, in the testimony of a witness taken under a commission, a *mistake* occurs in reference to the *time* of the transaction testified to, evidence is admissible to show the mistake and fix the true time.

THIS was an action on the case against the defendant as a *common carrier*, for the loss of 154 barrels of oysters shipped at *Buffalo*, to be transported across *Lake Erie* to *Detroit*, tried at the Albany circuit, before the Hon. JOHN P. CUSHMAN, one of the circuit Judges.

The oysters were shipped in the month of November, 1835, on board the steamboat *Columbus*, belonging to the

McArthur v. Sears.

defendants. The master was directed to ship them below deck, but placed a portion of them on the promenade deck. In attempting to enter the port of *Erie* or *Presque Isle Bay*, an intermediate port between Buffalo and Detroit, the vessel grounded, and a portion of the oysters were thrown overboard to relieve the vessel, and the residue, in consequence of the grounding of the vessel, were frozen. The disaster to the vessel happened under these circumstances: It was night when the vessel approached the harbor of *Erie*, the weather was hazy, with flurries of snow. The beacon light on the end of the pier was seen occasionally through the flurries of snow. Besides the beacon light, there was usually a light at the window of the house of the keeper of the beacon light, bearing west-southwest about 50 rods distant from the beacon light, and the usual way of steering into the channel was to bring the beacon light and the light in the keeper's house into a range, and take them as a guide in entering the harbor. A light was observed, which was supposed to be the light in the keeper's house, but which proved to be a light on board another steamboat, the *North America*, which had been driven ashore in a previous gale, and in navigating the vessel so as to bring in a range the two lights, that is, the beacon light and the light on board the *North America*, which was mistaken for the light in the keeper's house, the boat struck on a shoal. After she struck and got on the shoal, the wind blew hard, the sea ran high and the vessel labored, strained and pounded very hard, which made it necessary to throw the oysters overboard to save the vessel and cargo. It was proved that the master of the *Columbus* was one of the most competent masters of steamboats on the lake, and that the most prudent master might have run his boat ashore under the existing circumstances. The facts above stated, in reference to the disaster, appeared by the *depositions* of two experienced seamen taken under a *commission*. From the language of the interrogatories and answers, these witnesses are made to speak as if the transaction had taken place in November, 1836, instead of 1835. The defendants offered to prove that the *time* referred to in the depositions

McArthur v. Sears.

was in fact 1835, by showing that the Columbus did not sail in the year 1836, and otherwise, that the depositions related to the transaction in question ; but the explanatory testimony was objected to, and rejected by the judge. The counsel for the plaintiff then insisted that the depositions should be excluded : 1. Because they related to a transaction which happened in 1836, whilst the subject matter in controversy arose in 1835 ; and 2. If they related to the matter in controversy, the testimony was irrelevant, and proved nothing material to the defence. The judge excluded the depositions, and the jury, under his direction found a verdict in favor of the plaintiffs for \$1506 86. The defendant moved for a new trial.

M. T. Reynolds, for the defendant.

J. Holmes & S. Stevens, for the plaintiffs.

By the Court, COWEN, J. The first ground of objection to the depositions is, we think, clearly untenable. Nothing is better settled than that a party may set his own witnesses right by other evidence of a material fact, even though it contradict and tend indirectly to discredit them. Phil. Ev. 7th Lond. ed. 309. Id. 8th Lond. ed. 902, and the cases there cited. Savage, Ch. J. in *Lawrence v. Barker*, 5 Wendell, 305. *Jackson ex dem. Hopkins v. Leek*, 12 id. 105. Livingston, J. in *Steinback v. The Col. Ins. Co.* 2 Caines' R. 131. This should be especially so, being offered by way of correcting a mere date, into a mistake of which the witnesses were probably led by the interrogatories, and which, of all facts, slides the easiest from the memory. In reason, the rule applies as well to depositions as to oral evidence. Admitting, however, that the depositions are thus explainable, it is insisted that they did not tend to establish the point in issue. No doubt they were incompetent, if this be so, and were properly excluded.

The matter of the depositions is said to be irrelevant : 1. Because the defendant, having violated his instructions in the manner of stowing the oysters, forfeited all right to de-

McArthur v. Sears.

fend himself even on the narrow ground that the loss was by the act of God ; secondly, that the matter does not tend to show the latter excuse. It is an answer to the first that a portion of the oysters were properly stowed, and yet the verdict was for the value of the whole. The second objection involves the inquiry whether the depositions tended in the least totally to exculpate the defendant from the charge of neglect, and link the disaster to inevitable causes disconnected with human agency. The defendant was a common carrier ; and it is not denied as a general rule, that, to protect himself from responsibility for the loss, he was bound to prove that it arose from the act of God, or the enemies of the country. To the latter, the proof offered makes no pretensions ; and it was thrown out in argument that the former part of the rule has no application to carriers navigating the dangerous waters of Lake Erie. No such local exception is known to the law of England or Scotland, whatever the general dangers of the navigation. 2 Kent's Comm. 597, 607, 608, 3d ed. Nor can it be indulged with safety either in principle or practice. No such exception has been made by any case in this state ; nor am I aware that it has ever been contended for, though there have been several closely litigated suits for losses by carriers upon our great lakes. I do not find that it has been recognized by any case in the neighboring states ; and distinctions in favor of carriers by water generally, which have been countenanced in one case, *Aymar v. Astor*, 6 Cowen, 266, by a dictum of the late chief justice of this state, and by two or three cases in Pennsylvania, have been treated as unfounded anomalies, to be disapproved as contrary to decisions in neighboring states, and even in our own. Story on Bailm. 323, § 497. 2 Kent's Comm. 607, 8, 3d ed. *Crosby v. Fitch*, 12 Conn. R. 419. In *Elliott v. Rozell*, 10 Johns. R. 1, the rule was applied to the navigation of the River St. Lawrence in scows, late in the season, between Ogdensburgh and Montreal, which was known by the shippers to be very dangerous. See also *Kemp v. Coughtry*, 11 Johns. R. 107. *Colt v. M'Mechen*, 6 Johns. R. 160. *Harrington v. Lyles*, 2 Nott & M'Cord, 88, 9, and the

McArthur v. Sears.

cases there cited. *Williams v. Grant*, 1 Conn. R. 487, and several cases hereafter cited. *Bell v. Reed*, 4 Binn. 127, was like the one at bar, a case of navigation on Lake Erie; and proceeded throughout on the assumption that the defendants must, in order to excuse the loss, prove the utmost care in themselves, and convince the jury that the loss arose from the act of God.

In *Gordon v. Little*, 8 Serg. & Rawle, 533, it was held that a *general usage*, softening the responsibility of carriers on the western waters, was admissible in their defence. This was the case of a keel boat sailing from Pittsburg in Pennsylvania, to Hopkinsville, Kentucky. But no offer of that kind was made in the case at bar; and it may be very questionable, since the late cases in this court denying all restriction even by notice, whether such a custom, which must arise from the management of carriers, would be sustainable in true policy, owing to the opening which it gives for fraud and collusion, &c. In *Aymar v. Astor*, before cited, and *The Schooner Reeside*, 2 Sumn. 567, 560, a general commercial custom enlarging the phrase *perils or dangers* of the seas, in a bill of lading, so as to comprehend causes of loss beyond their legal import, was denied. Mr. Justice Story, in the last case, very properly expresses a general reluctance to the reception of such proof in cases where it has not heretofore been applied. He finally rejected it, because it worked a contradiction of the written agreement. *Turney v. Wilson*, 7 Yerg. 340, S. P. But see *Cherry v. Holly*, 14 Wendell, 26, and *Barber v. Brace*, 3 Conn. R. 9. Also *Lawrence v. McGregor*, 1 Wright, 193.

Nor have we any offer or intimation by counsel that they intended to go beyond the depositions in order to establish that the loss was by the act of God. The depositions are left to speak for themselves; and from them alone can we judge whether they were admissible. The utmost they show in respect to *natural causes*, are a considerable wind, at the close of navigation, and the darkness of the evening heightened by a fall of snow. Under these circumstances an attempt was made to enter the harbor in a narrow channel, for the master's safe conduct through which he knew

McArthur v. Sears.

that he depended on following a certain track by ranging with the beacon lights at the two light houses. On reaching the point where this range was to be taken, it so happened that the usual blaze at one of the light houses was for some cause not visible; and a light in the *North America*, a steamboat which lay grounded in consequence of a previous storm, was easily mistaken for that of the farther house, whose light was invisible. Of the disaster to the *North America*, the defendant's master could probably have learned nothing, and could not, therefore, have been prepared to suspect the delusion. Indeed, the two experienced seamen who made the depositions in question concur to prove that the circumstances were such as to baffle the skill and care of an accomplished master accustomed to sailing this water; and the jettison of the oysters, being necessary for the safety of the boat, was lawful, if the stranding arose from a justifiable cause. Story on Bailm. 336, 7, 8, § 525, 527. Id. 339, 40, § 530, 531, and the cases there cited. And see *Lenox v. United States Ins. Co.*, 3 Johns. Cas. 178, and *Smith v. Wright*, 1 Caines' R. 43.

The object of the depositions then was to excuse the loss by a mistaken deviation to which the master was led by a concurrence of circumstances over which he had no control; and they strongly tended to free him from all charge of neglect. So far they were material, if the loss had depended wholly on natural causes; for the least degree of negligence would, notwithstanding, make the carrier liable. Story on Bailm. 332 to 334, § 516, 17. *Williams v. Grant*, 1 Conn. R. 487.

But looking at all the grounds on which the depositions place the mistake, there is, I apprehend, an insurmountable difficulty, in saying that there was not such an admixture of human means as must vitiate the defence. It is insisted that the defendant's vessel was at a proper point of observation, yet no blaze at one of the light houses was to be seen, and the delusive light in the *North America* was mistaken as one by which to steer. The absence of the first was probably owing to neglect, and the latter must have been lighted and kept burning by a person about the boat

McArthur v. Sears.

to which it belonged. This contributed as much towards the mistaken deviation by which the defendant's vessel was stranded, as the absence of the usual signal at the light house. I have sought in vain for any case to excuse the loss of the carrier, where it arises from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if it be the result of human means, the carrier is responsible. A stronger case cannot be put than the common one, plunder by a band of robbers or rioters. Take the case of the riot of 1780, in which Lord Mansfield's house was destroyed, and a considerable military force could not prevent extensive and indiscriminate destruction in the city of London. Lord Mansfield has himself, in 1 T. R. 34, put even this as an instance which could not be received to protect a common carrier. With regard to such a change of circumstances unknown to the defendant, by which he or his servants are led into unavoidable mistake, the leading case is that of *Smith v. Shepherd*, Abb. on Shipp. part 3, ch. 4, § 1. The loss in that case happened at the entrance of the harbor of *Hull*. Just before the defendant's vessel had reached the place, a bank there, formerly shelving, had been rendered precipitous by a great flood, where a vessel sunk by getting on the bank, having a floating mast tied to her. The defendant's vessel striking the mast, was forced towards the bank, where, owing to change in the bank occasioned by the flood, the loss happened. The natural cause, the act of God in changing the bank, was laid out of question, as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which it was attached, were the only remaining causes, and one, if not both, were obstructions placed there by human agency. Evidence was offered to show that there had been no actual negligence on the side of the defendant; but it was overruled at the circuit, and a verdict found for the plaintiffs, which was sustained by the court. This cause was tried in 1795 and was but following out a previous case, tried ten years

McArthur v. Sears.

before, that of the proprietors of the *Trent Navigation v. Wood*, 3 Esp. R. 127. The latter case, though given by a *nisi prius* reporter, was, like the former, considered by the king's bench. The defendant's vessel sunk by driving against a concealed anchor in the river, which belonged to a barge lying near; but the bargeman did not, as he should have done, place a buoy to apprise others where his anchor lay. Cowper, of counsel, made a point that the defendant could not excuse himself on the conduct or neglect of another, the bargeman. Lord Mansfield, said "The act of God is a natural necessity, and inevitably such, as winds, storms, &c. The case of robbery, is certainly very strong; but not a natural necessity, and in this case there is an injury by a private man, within the reason of the instance of robbery, yet I think the carrier ought to be liable." Ashurst, J. said, "If this sort of negligence were to excuse the carrier, when he finds that an accident has happened to goods from the misconduct of a third person, he would give himself no farther trouble about the recovery of them." Buller, J. said there was a legal negligence, though there might be none in fact. All three of the judges also intimated that there was some slight actual negligence in the defendant, which renders the case of somewhat less force for the point to which I have cited it. In *Forward v. Pittard*, 1 T. R. 27, a fire broke out 100 yards from the carrier's booth, where he had placed the goods for safe custody before he started. It burnt with extinguishable violence, and reaching the booth, consumed the goods. All this was without any actual negligence of the defendant, and was not occasioned by lightning. Lord Mansfield said, the carrier is liable beyond his contract. He is in the nature of an *insurer* against every event except the act of God, &c. "Now what is the act of God? I consider it to mean something in opposition to the act of man." He adds, that the law presumes against a carrier, until he shows that the loss arose from such an act as "could not happen by the intervention of man, as storms, lightning and tempests. In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of

 McArthur v. Sears.

man ; for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case, is liable, inasmuch as he is liable for *inevitable accident*." It seems by these cases, that the words *inevitable accident*, which are preferred by some to "act of God," because more reverent, are not adequate to express the ground of a common carrier's excuse ; for accidents arising from human force or fraud, are sometimes inevitable. I believe it is a matter of history that inhabitants of remote coasts accustomed to plunder wrecked vessels, have sometimes resorted to the expedient of luring benighted mariners by false lights to a rocky shore. Even such a harrowing combination of fraud and robbery would form no excuse. On the authority of *Forward v. Pittard*, Lord Tenterden lays down the rule thus : "The expression, *act of God*, denotes natural accidents, such as lightning, earthquake and tempest ; and not accidents arising from the fault or negligence of man." And see Story on Bailment, 330, § 511 ; Jeremy's Law of Carriers, 56. To the cases already cited, may be added *Campbell v. Morse*, 1 Harp. Law Rep. 468 ; *Harpell v. Owens*, 1 Dev. & Beat. 273 ; Kent. Ch. J. in *Elliott v. Russell*, 10 Johns. R. 11 ; *Robertson v. Kennedy*, 2 Dana, 430 ; Green, J. in *Gordon v. Buchanan*, 5 Yerg. 82 ; *Turney v. Wilson*, 7 id. 340. A man hires his vessel to be repaired by a skilful workman, who makes a rudder apparently sound, but internally rotten, and the loss happens by reason of its breaking. The owner is liable, though he was ignorant of the defect. *Backhouse v. Sneed*, 1 Murph. 173.

The farthest that any of the cases appear to go in favor of the carrier is to excuse him where the loss happens by his vessel being forced by the wind, or other natural and inevitable cause, against some permanent artificial object, as the pier of a bridge erected by another. *Amies v. Stevens*, 1 Str. 128, cited and approved by Spencer, J. in *Colt v. M'Mechen*, 6 Johns. R. 165.

There is a considerable class of cases arising upon exceptions in bills of lading, of the "perils of the sea," where, in addition to losses from *natural causes*, those arising from the acts of third persons are sometimes allowed to come within

the terms. Such are losses by robbery of pirates, *Pickering v. Barkley*, Sty. 132, 2 Roll. Abr. 248, *Buller v. Fisher*, Abb. on Ship. pt. 3, ch. 4, § 2, and the collision of ships without fault of either party. Story on Bailm. 332, § 514, and cases there cited. But these words are evidently of broader compass than the words "act of God;" and although it was supposed by a very learned judge that they were but commensurate, Gould J. in *Williams v. Grant*, 1 Conn. R. 487, 492, and therefore whatever was a peril of the sea would excuse the carrier acting under his general liability, yet it is evident from the cases we have considered, that they are not always so. The distinction was adverted to, but not much examined by Story, J. in *The Schooner Reeside*, 2 Sumn. 571. The case of *Aymar v. Astor*, 6 Cowen, 266, was an action on a bill of lading, excepting the *dangers of the seas*. The goods were damaged on the voyage by rats; and it was held that the defendants having taken every precaution to avoid their depredations, the loss was by a *danger of the sea* within the policy. This case, we noticed before, has been treated as tending to upset the law extending the implied liability of common carriers to the water. Story on Bailm. 323, § 497. 2 Kent's Comm. 472, 3, 1st ed. Id. 608, 3d ed. *Crosby v. Fitch*, 12 Conn. R. 419. The case itself has no such tendency. There are in the case *dicta* of the chief justice, which, not being at the moment and in terms confined to the case as it stood on the exception in the bill of lading, were left open to the construction which has been put upon them by the learned commentators and by the case cited. My own marginal note of the case, I observe, runs into the same error. Cases as to the meaning of the words *perils of the sea* often arise also upon policies of insurance. See 1 Phil. on Ins. 249, 50, and 2 id. 191. For instance, it was held that the loss of a ship by the sudden impressment of sailors sent on shore to fasten it, was a loss within the policy. *Hadgson v. Malcolm*, 5 Bos. & Pul. 336. Yet it seems clear, on the cases, that such an act could not be received to exempt a common carrier either as the act of God or the enemies of the state. It may be irresistible. So we have seen of many acts merely human;

McArthur v. Sears.

still they may be collusively committed. The carrier may collude with a press-gang as well as with robbers or illegal kidnappers. The difficulty returns, therefore ; if we receive the immediate agency of third persons in any shape, we open that very door for collusion which has denied an excuse by reason of theft, robbery and fire. *Marsh ad. Blyth*, 1 Nott & M'Cord, 170, which held it a defence that the carrier's vessel was, without his fault, run down by another, is an instance in which the rule in respect to the special exception in a bill of lading has been applied to the carrier's general liability. There may be other cases of the like character, but it seems clearly to me, from authorities I have been able to consult, that the expression *perils* or *dangers of the sea*, or *dangers of the river*, &c., will be found to allow, in several cases, human agency and other causes to excuse a loss, which cannot be allowed in favor of common carriers, without giving up the rigorous obligation imposed upon them by the policy of the law. See also Story on Bailm. 330, 1, 2, § 512 to 514. 2 Kent's Comm. 3d ed. 599; 600, 607, 8. 3 id. 215, 217, and the cases cited by those authors, especially *Butler v. Fisher*, 3 Esp. R. 67. 1 Phil. on Ins. 250, 1. 2 id. 191. On the other hand, in *Lawrence v. M'Gregor*, 1 Wright, 193, 197, Wright J. at nisi prius charged that by whatever degree of negligence another boat might run down the carriers, this formed no excuse. *Gordon v. Buchanan*, 5 Yerg. 71, and *Turney v. Wilson*, 7 id. 340, take the distinction. In the former, Green, J. said, "the exception in this bill of lading of *the dangers of the river, which are unavoidable*, narrows down the liability of the owner of the boat. Many of the disasters which would not come within the definition of the act of God, would fall within the exception ; such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided." This was repeated and adjudged in *Turney v. Wilson*. And see *Johnson v. Friar*, 4 Yerg. 48, and *Craig v. Childress*, Peck, 270. Mr. Justice Story seems to suppose that if an obstruction be secretly sunk in the stream, and not being known to the carrier, his boat

McArthur v. Sears.

founder, he would be excused. Story on Bailm. 334, 335, § 518. But the cases do not appear to sustain him, unless the obstruction were sunk by the act of God, as by a sudden and extraordinary flood. This may change the position of the shore, raise a sand bar, or sink obstructions unknown to the approaching navigator. If it arise from ordinary causes, it would be otherwise, for the carrier undertakes against these. Should a navigator, by mistake, run against a snag in a river where such obstructions are known to abound, as in the river Hatchie, see 4 Yerg. 49, whatever might be his care, he would not be excused without an exception in the bill of lading of *dangers of the river*. This, I think, is clearly collectable from the cases already cited, of *Johnson v. Friar* and *Gordon v. Buchanan*.

In the case at bar there was no exception in the bill of lading. Of course, there is no room to contend that though the loss may not have happened from natural causes incapable of being foreseen, yet it was by a peril of the lake. The defendant stands chargeable as common carrier without qualification. The depositions setting up the fact that the mistaken deviation on entering the harbor arose from the act or negligence of some person, was equivalent to an offer by counsel to prove it, with the additional fact that the defendant's servants who managed the vessel were without fault. This, which we have seen would have been material, had the real cause of loss proposed to be shown, been such as would in law exculpate a common carrier, was neutralized by the want of such a proposition; indeed by the assertion of a cause which could have no such effect. The judge at the circuit, therefore, took substantially the same course as was done in *Smith v. Shepherd*, before cited. Evidence of the utmost care ceased to be relevant, so soon as it was seen that the loss was not caused by the act of God. The depositions could not with propriety be submitted to the jury to prove a case which on its face was unavailable.

My opinion is, therefore, that a new trial must be denied.

New trial denied.

 Smith v. Ransom.

SMITH and others vs. TALLCOTT & RANSOM.

Where a contract for the sale of a lot of land, was drawn up in which a husband and wife and a trustee of the wife, were described as the parties of the first part, and the purchasers as the parties of the second part, which on the part of the parties of the first part was executed only by the husband and wife, but the trustee by an endorsement upon the back thereof, bound himself to do what should be necessary on his part to carry the contract into effect: it was held, that the two instruments being parts of the same contract, might be declared upon as constituting together but one instrument, and that a suit might be maintained in the joint names of the husband, the wife and the trustee, and that had the name of the trustee been omitted the declaration would have been fatally defective.

It was further held, inasmuch as it appeared that the wife had a separate interest in the subject matter of the contract, that she was properly made a party plaintiff.

DEMURRER to declaration. The plaintiffs Gerrit Smith, James Cochran and Catharine V. R. Cochran, declared against the defendants for that on the 21st March, 1836, at, &c., an instrument in writing, or agreement sealed with the seals of the plaintiffs and of the defendants, was entered into in the words and figures following, that is to say, "This agreement made this 21st March, 1836, between Gerrit Smith as the trustee of Mrs. Catharine V. R. Cochran, James Cochran, her husband, and the said Catharine of the first part, and R. Tallcott and J. W. Ransom of the second part: Witnesseth, that the said parties of the first part, covenant with the parties of the second part, their heirs and assigns, that on the fulfilment of the covenant hereinafter mentioned on the part of the parties of the second part, to procure to the parties of the second part, their heirs and assigns and in their names a patent from the people of the state of New York, conveying lot No. 46 in block No. 64, in the village of East Oswego. But as a condition precedent to the obtaining or delivery of said patent, the said parties of the second part, covenant to pay therefor \$13,000 as follows: \$1292 59, on 15th April next at which time the parties of the first part are to deliver possession of the premises; the parties of the second part are to pay to the people of the state, as a part of the purchase money, \$707 41, being the

Smith v. Ransom.

principal and interest due to the state on the said 15th April; and the balance \$11,000 to be paid as follows: \$5500 in five years, and the residue in ten years from the said 15th April, with interest from said 15th April, to be paid annually. The *payments to be made to Mrs. Cochran*, and her receipt to be the proper voucher during her lifetime; and after her death the payments to be made to any person she may have designated, or to her legal representative. (Signed) Catherine V. R Cochran, [L. s.] James Cochran, [L. s.] Richard Tallcott, [L. s.] J. W. Ransom, [L. s.] Then followed an instrument in these words, "I hereby approve of the within contract; obligating myself however to perform no other act *than to assign* whenever the above Catharine V. R. Cochran shall request me to do so *the surveyor general's certificate* of the within premises, to the above Tallcott and Ransom, that the same may be patented to them by the state, (signed) Gerrit Smith, [L. s.] The plaintiffs then averred that the said instruments so sealed and executed, *were and are parts and parcels of one and the same instrument, contract or agreement*; that on the 15th April, 1836, the plaintiffs surrendered, and the defendants took possession of the premises; and on the 1st January, 1837, the defendants paid taxes assessed on the premises subsequent to 15th April, 1836; that on 1st December, 1837, the defendants paid into the public treasury \$106 14, interest due to the state upon the premises, the subject of the contract; that on 15th April, 1836, the defendants paid to Mrs. Cochran \$1350, the sum then due upon the contract, and accepted her receipt as a voucher for such payment, and on 22d April, 1837, made a further payment of \$535, to her, in part payment of the interest due on the contract. The plaintiffs then aver general performance on their part, and allege as *breaches* on the part of the defendants, the non-payment of \$235, *part* of the interest due on the 15th April, 1837, and the non-payment of \$770 due as interest on the 15th April, 1838, and so they say the defendants have not kept their covenant, &c. The declaration contained a second count, declaring on the same instrument as a *deed poll*, setting forth the covenants on the part of the defendants, and alleg-

Smith v. Ransom.

ing as a breach the non-payment of the interest moneys due in 1837 and 1838.

The defendant Tallcott appeared alone and demurred to the *first count* of the declaration, assigning as *special causes of demurrer*, the following: 1st. The agreement signed by Mr. & Mrs. Cochran, has never been executed by Gerrit Smith. 2d. Gerrit Smith is not a party to the agreement signed by the defendants, and cannot maintain a suit upon it. 3d. The defendants' *covenant to pay* is founded upon Smith's *covenant to convey*, and as he has not executed the agreement, the consideration of the defendants' covenant has failed. 4th. The two instruments set forth in the first count *are not one contract*; they provide for acts essentially different. 5th. There is a *variance* between the agreement as set forth in the count, and as contained in the instruments. 6th. Though Gerrit Smith is described in the first instrument as the *trustee of Mrs. Cochran*, he has not executed it, nor has he executed the second instrument in that capacity, nor is he bound to the defendants in that or any other capacity. 7th. There is no covenant on the part of the defendants *to pay to Gerrit Smith*. 8th. Mrs. Cochran could not properly be joined as party plaintiff. And 9th. The first count contains many unnecessary and impertinent averments. As to the *second count*, the defendant craved *oyer*, set forth the instruments declared upon in the first count, and *demurred* to the second count, assigning substantially the same special causes of demurrer as those assigned to the first count.

L. H. Sandford & S. Stevens, for the defendants.

C. P. Kirkland, for the plaintiffs.

By the Court, NELSON, Ch. J. There can be no doubt but that *Smith* is properly made a co-plaintiff, and, according to the first case of *Petrie v. Bury*, 3 Barn. & Cres. 353, the omission of his name would have been fatal. The intimation in *Vernon v. Jefferys*, 2 Strange, 1146, that the omission to *seal* might be cured by averment, seems to have been disregarded in the above case; but it is conceded in

Prosser v. Woodward.

Strange, that a party named in the covenant might join in the action, though he did not seal. 1 Saund. Pl. & Ev. 390. 1 Selw. 351. 6 Wendell, 629.

The two instruments, I think, must be regarded as one in legal effect : standing upon the same footing as if the one signed by Smith had been incorporated in the body of the principal agreement. It is but a qualification of his liability as therein set forth, and intended as such. Had it been embraced in the body of the instrument, there could have been no doubt in the case ; for though his liability is distinct and separate from that of Cochran and wife, still there would be but one instrument, and that executed by all the parties.

There can be no doubt the wife is properly joined ; the covenant is made to her with others, and it is apparent she has a distinct interest. 1 Chitty's Pl. 20. 10 Johns. R. 49. From the above view of this case, it follows that both counts are good.

Judgment for plaintiffs, with leave to defendant to amend on usual terms.

PROSSER & PETRIE vs. WOODWARD.

Where a defendant in *replevin* pleads *property in a third person*, traversing the plaintiff's right, a *replication* traversing the right of such third person, and setting up a *general property* in another, and a *special property* in the plaintiff, is *bad* in three particulars : 1. for not taking issue upon the defendant's traverse ; 2. for traversing matter of inducement ; and 3. if such matter could be replied, for alleging *the evidence* of title, instead of the legal effect of the evidence. The proper course for the plaintiff would have been to have accepted the issue tendered, and to have re-affirmed his title concluding to the country.

It seems, that in *replevin*, a plea of property in a third person, found for the defendant entitles him to a return, although he offers no proof connecting himself with the title of such third person. Such defence, however, is not allowed in *trespass* or *trover*.

Whether a declaration in *replevin*, merely alleging that the plaintiff was entitled to the possession of the goods, instead of charging the taking of goods of the plaintiff, is good, *quere*.

DEMURRER to replications. The plaintiffs declared in *replevin*, for that the defendant on, &c., at, &c., did unjust-

Prosser v. Woodward.

ly take and detain a canal boat, together with her apparel and furniture, *goods and chattels which the plaintiffs were then and there entitled to the possession of*, of great value, &c. The *third* plea of the defendant was *actio non*, &c., because the said goods and chattels, at the said time, when, &c., were the property of Heman Ward and Mahlen Kingsman jointly, *without this, that the plaintiffs had any lawful right to the possession thereof*, as by the declaration, is above supposed. Verification, &c. The plaintiffs *replied*, that the said goods and chattels, at the said time, when, &c., *were not the property of Heman Ward and Mahlen Kingsman jointly*, in manner and form as the defendant has in his third plea alleged ; and they averred, that *the said goods and chattels* at the said time, when, &c., *were the property of Heman Ward*, and that he, being the owner thereof, *did*, to wit, on, &c., at, &c., by a certain agreement in writing for a valuable consideration, *let and hire unto the plaintiffs the goods and chattels* in the declaration mentioned, for a term, &c. ; and that the plaintiffs *being in the lawful possession thereof, under and by virtue of the said agreement*, the defendant at the said time, when, &c., and before the term expired, did take and unjustly detain the same. Verification, and prayer of judgment. *Special demurrer and joinder*. The *fourth, fifth and sixth* pleas were substantially like the third, only alleging property in different individuals. To each of which there was a replication, demurrer and joinder, like those to the third plea.

J. A. Spencer, for the defendant.

S. Stevens, for the plaintiffs.

After argument, the following opinions were delivered :

By Mr. Justice BRONSON. The pleader who drew the declaration has not followed the precedents, and alleged that the defendant took certain goods and chattels *of the said plaintiffs* : but the allegation is, that the defendant took certain goods and chattels *which the plaintiffs were*

 Prosser v. Woodward.

then and there entitled to the possession of. It does not necessarily follow from this averment that the action can be maintained. The plaintiffs may have been *entitled to the possession*, without being the general *owners* of the property ; and they may have been so entitled, although the *actual possession* was at the time in the defendant or a third person, and although such possession was *adverse* to the plaintiffs. The supposed taking may have been by finding, or by the delivery of a third person who had a special property in the goods. The declaration may be true, and yet the case may be such, that if replevin will lie in any form, it must be for *detaining*, not for *taking* the property. *Marshall v. Davis*, 1 Wendell, 109. *Randall v. Cook*, 17 id. 53. I doubt whether the declaration can be supported. But the point was not made on the argument, and need not now be decided.

If the declaration can be maintained, the plaintiff must still fail on the ground that the replication is vicious. The following rules laid down by Serjeant Williams, are abundantly supported by authority : 1. Whenever a material fact is alleged in any pleading, which, if denied, will, upon issue joined, decide the cause one way or the other, if the adverse party plead a matter inconsistent with and contrary to such allegation, he must traverse it. 2. Whenever such a traverse is taken, the other party is bound to it, and cannot waive it, and tender another traverse ; for the parties are not to go on *ad infinitum*. 1 Saund. 22, n. 2. See also 1 Chit. Pl. 593, 4, and cases cited. In replevin, the declaration alleges title in the plaintiff. This is a material fact, which, if issue be joined upon it, may decide the cause one way or the other. When the defendant pleads any matter inconsistent with that allegation, as property in himself or a stranger, he must conclude with a traverse of the plaintiff's title. The allegation of property in the defendant or a third person, is but inducement to the traverse. The point upon which the issue must be joined, and on which the jury must pass, is, whether the plaintiff has such a title to the property as will enable him to maintain the action. *Bemus v. Beekman*, 3 Wendell, 667. *Rogers v. Arnold*, 12 id. 3C. When the de-

Prosser v. Woodward.

fendant takes a traverse upon this material fact, the plaintiff is bound to it—he cannot waive it, and tender another traverse. Without such a rule the pleadings would run into endless prolixity. With a few very special exceptions, there cannot be a traverse after a traverse, when the first traverse is material and pertinent. 1 Saund. 22, n. 2. Com. Dig. Pleader, G. 17, 18. *Mayor of Oxford v. Richardson*, 4 T. R. 437. Although this judgment was reversed in the exchequer chamber, it was on a ground which left this point untouched. 2 H. Black. 182. 5 T. R. 367.

It is also a rule of pleading that matter of inducement cannot be traversed. Com. Dig. tit. Pleader, G. 14. *Lady Chichesley v. Thompson*, Cro. Car. 104.

In replevin, as well as in other actions, it must appear by the declaration that the plaintiff is the person injured. It would be idle to charge the defendant with taking the property without showing the plaintiff's right to maintain the action. In the case at bar, the pleader who drew the declaration, although he has not followed the precedents, has alleged *that the plaintiffs were entitled to the possession of the goods* which the defendant took. If this be a sufficient substitute for the usual averment of property in the plaintiffs, it was a material allegation, which the defendant was bound to traverse when he set up property in *Ward and Kingsman*. The defendant did traverse this allegation; and the plaintiffs in their replication should have accepted the issue thus tendered, by re-affirming their title to the possession of the property, and concluding to the country. But instead of doing so, they have first traversed the inducement to the plea, which was not traversable, and then shown how they were entitled to the possession of the property—concluding with a verification. In this way the parties may never arrive at an issue. It would be a good rejoinder to the replication, to repeat the plea over again; indeed, that is the only answer which the defendant could make. The defendant is entitled to judgment on the demurrers.

By Mr. Justice COWEN. The pleadings in this case are all anomalous, owing to the plaintiffs' mode of declaring.

PROMER v. WOODWARD.

Instead of alleging that the boat and furniture, &c., were the goods and chattels of the plaintiffs, according to the correct form, they chose to start specially by averring that they were entitled to the possession. This is therefore traversed by the defendant, after averring that property was in others. He is then met by the plaintiffs with replications denying that property was in others, and showing specially a bailment to themselves by the true owner, which entitled them to the possession. The formal language of such pleadings, as may be collected from Gilbert on Replevin, app. 235 to 278, Lond. ed. of 1794, would be first a complaint that the defendant took "the boat, &c. of them the said plaintiffs," &c. The defendant would then plead, that "the property of the boat, &c., aforesaid was in one H. W. &c., without that, that the property of the boat, &c., aforesaid was in the said plaintiffs as they by their declaration aforesaid suppose." The plaintiffs would then reply "that the property of the boat, &c. was in the said plaintiffs in manner and form as they by their declaration aforesaid have above thereof alleged," with issue to the country. The pleadings thus framed, with the proper additions as to time, place, &c. would cover all the matters which either party might be desirous to give in evidence, whether the *property* in question were general or special. The substance of the issue thus joined is whether the plaintiff had such a property as would maintain replevin, or whether the person named in the plea had such a property as would defeat it. That may be either general or special. The inquiry is, *where was the right of possession?* *Rogers v. Arnold*, 12 Wendell, 30, and the cases there cited. The pleadings in the case at bar, therefore are, though informal, all of them sufficient in substance. The pleas are good and would entitle the defendant to a return without connecting himself in title with the persons in whom he alleges an outstanding title to be. The contrary is put with a *semble* in the abstract by the reporter of *Rogers v. Arnold*; but all the court do in that case is to doubt the accuracy of the reason on which the cases go. They admit that property in a stranger, without more, is a good defence; and no book nor any case questions

Prosser v. Woodward.

it, even as to the common law action of replevin, which always went on a tortious taking. On the contrary, the books all assert it. Per Nelson, J. in *Rogers v. Arnold*; and see Wilk. on Replevin, 48. The point was expressly adjudged in *Butcher v. Porter*, 1 Salk. 94; in *Parker v. Mellor*, 1 Ld. Raym. 217; and laid down as settled law in *Harrison v. M'Intosh*, 1 Johns. R. 380, 384. With us the like defence would not be allowed in trespass or trover, without a privity of interest between the defendant and the third person. The want of analogy between the defence in these actions and replevin is noticed in *Rogers v. Arnold*, but even this analogy is not violated in replevin for a mere unlawful detention, as given 2 R. S. 430, § 1, 2d ed.

I have said the pleadings in question are all good in substance. It follows that the whole case turns on the mere form of the replications. The first objection is, that they take no issue upon the traverses of the plaintiffs' property, but only on the allegations of property in Ward and Kingsman jointly, showing the plaintiffs' right of possession specially, under a contract of bailment and delivery by Ward alone, the true owner. It is supposed that the third person in whom property is alleged may be entirely disregarded. I doubt that when the case comes to proof; but we have seen that an issue on the traverse would have been sufficient, according to the precedents, to negative the outstanding property as pleaded; and then *cui bono*, go farther to deny that property? The authorities will, I think, be found against the right. Walworth, C. in *Bemus v. Beekman*, 3 Wendell, 672. *Lady Chichesley v. Thompson*, Cro. Car. 164. At all events, the plaintiffs need not have gone farther than to deny it and re-assert their own property. They have chosen to pass over the traverse, and to reply specially the evidence of their property. The rule is, that in pleading you must state the legal effect, and not the particulars from which it results. If particulars be stated, the pleading is argumentative, and it is therefore bad on special demurrer. I think the replications are obnoxious to this objection. It is supposed that *Harrison v. M'Intosh* recognizes the plaintiffs' mode of replying; but substance, not form, was the question

 Crocker v. Crane.

in that case. The replication there failed to show any right in the plaintiff's bailor.

It is not necessary to inquire whether the replications should have concluded to the country or with a verification. Had they been right in form, or not objected to by special demurrer, the books seem to allow a conclusion either way. *Baynham v. Mathews*, 2 Str. 871, and cases there cited. *Hedges v. Sandon*, 2 T. R. 439, and cases there cited. And see Hopkins' arg. in *Harrison v. M'Intosh*, 1 Johns. R. 363, 4.

The plaintiffs should have taken issue on the traverse as in Gilbert. An issue on the right of third persons, which was mere inducement, though followed by replying the evidence of the plaintiffs' right of possession, is bad on special demurrer. See also the following cases: *Mayor, &c. of Orford v. Richardson*, 4 T. R. 437; 2 H. Black. 182, S. C. on error: *Thrale v. Bishop of London*, 1 id. 376. See also 1 Saund. 22, note 2.

The CHIEF JUSTICE concurred in the result of the preceding opinions.

Judgment for defendant.

 CROCKER & WILLIAMS vs. CRANE.

Where an act of incorporation of a rail road company, appoints a *certain number of commissioners* to open books to receive subscriptions to the capital stock of the corporation, and to distribute the stock among the several subscribers in such manner as they shall deem most conducive to the interests of the corporation, making no provision that a majority shall constitute a quorum for the discharge of the duties entrusted to them, *all must be present to hear and consult* when they come to distribute the stock, although a majority are competent to decide. In the distribution of the stock they act *judicially*; not so as to receiving subscriptions, in respect to which they act only ministerially, and it is not necessary for that purpose that even a majority should be present.

The *commissioners* are not authorized in such case to receive the checks of the subscribers in payment of the sum required to be paid at the time of subscription; *specie* or its equivalent *current bills of specie-paying banks* must be demanded. Whether payments in checks are a compliance with the statute, is a question of law, and not of fact to be submitted to a jury. A distribution of stock by commissioners, not sufficient in number to consti-

Crocker v. Crane.

tute a legal board, is *coram non judice* and void; and a check, note or other instrument, given for the payment of the first instalment of stock subscribed for, is void for the want of consideration.

A *fraud* practiced by one of the commissioners upon his co-commissioners, and upon a portion of the subscribers in the distribution of the stock, cannot be set up by a *subscriber* to vitiate the proceedings of the commissioners, the subscriber *quoad* the proceedings, is deemed a *party* to the adjudication; *strangers* may impeach a covinous judgment, but not *parties*.

Where a statute declares that "A. B. and C. and *such other persons as shall hereafter become stockholders of said company*, are hereby constituted a body corporate and politic by the name of, &c." no corporation exists if there be no stock distributed: the distribution of the stock, is a *condition precedent* to the existence of the corporation.

In the construction of a statute, if the *meaning* of the legislature be manifest, the intention will be carried into effect, although apt words are not used in the act.

THIS was an action of *assumpsit*, tried at the Chautauque circuit in July, 1837, before the Hon. ADDISON GARDNER, then one of the circuit judges.

The suit was brought on a check drawn by the defendant, in July, 1836, on the Commercial Bank of Buffalo, for \$2002, payable to the order of John Z. Saxton, and *endorsed* by him and five other persons. On the trial of the cause a certificate of a *notary* was produced, stating, that on 12th October, 1836, the check was presented at the bank for payment, payment refused, and notice of non-payment sent by mail to the drawer and endorsers at *Fredonia*. On this proof the plaintiffs rested. A nonsuit was moved for on the grounds: 1. Of a variance between the check produced, it having *six* endorsers, and the check described in the plaintiffs *bill of particulars* it having but *one* endorser; 2. That it did not appear that the drawer or endorsers of the check resided at *Fredonia*; 3. That the check was not presented in due time, three months having elapsed, &c. The nonsuit was denied. The defendant then entered upon his defence, and produced testimony in support of the facts set forth in the *notice attached to his plea*, in which he stated in substance, that he would prove on the trial of the cause, that the check in question was given by him on his subscribing for 143 shares of stock of the *Buffalo and Erie Rail Road Company*, the shares being \$50 each, and the act incorporating the company requiring the payment of

Crocker v. Crane.

two dollars on each share at the time of subscription, and that the check in question was accordingly given and received in payment; that at the time the commissioners well knew that the defendant had not any funds in bank, that it was understood that the check was received wholly on the credit of the drawer and endorsers, and that it should not be presented for payment until after the expiration of thirty days; that some of the commissioners appointed to receive subscriptions for and make distribution of stock, acted *fraudulently* in the premises whereby the whole proceeding became a nullity; that *four* of the individuals appointed *commissioners* by the act of incorporation, did not attend and were not present at the receiving of subscriptions for stock, or in the distribution of stock; and that the check in question was put in circulation contrary to the expressed directions of a majority of the commissioners who received the same, and came to the possession of the plaintiffs with full knowledge of the above facts and circumstances. The evidence in relation to the *worthlessness* of his check produced by the defendant was this: the commissioners had received from some of the subscribers *uncurrent bills*, and although one of their number offered to take such bills and give *current funds* therefor in 30 days, the commissioners preferred to take the checks of subscribers, provided they were well endorsed. Three of the commissioners testified that it was understood at the time, that the drawers had no funds in the banks on which they drew; but it also appeared that one of the inducements for accepting the checks, was that the money would not probably be wanted soon, and that the checks would not immediately be presented. The evidence in relation to the *fraud* was this: There were two routes contemplated for the road, one by the way of *Fredonia*, and the other by way of *Dunkirk*. A person residing at *Dunkirk* desirous that the road should pass through that place, deposited with one of the commissioners a large sum of money, and requested him to procure subscribers for stock for his benefit, and to make the required deposit on the stock being subscribed for. The commissioner procured subscribers, and paid out about \$6000 on

Crocker v. Crane.

their subscriptions. The principal in this transaction also subscribed for stock in his own name. On the distribution of the stock, none was allowed to him, a majority of the commissioners in the exercise of their discretion intending to give a majority of the stock to the subscribers who were in favor of the *Fredonia route*. The commissioner who had procured subscribers as above, advocated the giving of stock to the subscribers in favor of the *Dunkirk route*; his colleagues were ignorant that he had acted as the agent of another in procuring subscribers, and in the *finale* of the matter, it turned out that the subscribers who preferred the *Dunkirk route* had obtained a majority of the stock, and of course had the control of the affairs of the company. When the result was known a majority of the commissioners protested, and directed one of the commissioners who had charge of the checks which had been received, not to put them into circulation; but it seems that *directors* of the company were subsequently appointed, and that the check in question got into circulation. It was admitted by the plaintiffs that they received it for a pre-existing debt, and held it subject to the same equities which might be objected against the recovery of its amount, had the suit been brought in the name of the rail road company. It was proved that the making of the road *was not commenced* on the 29th day of July, 1836.

The counsel for the defendant requested the judge to charge the jury: 1. That an act of the legislature enacted 7th May, 1836, entitled "An act to amend the act entitled An act to incorporate the Buffalo and Erie Rail Road Company passed April 14, 1832," by the first section of which *the time for commencing the road*, is extended to 14th April, 1838, did not *revive* the act of 1832 which expressly declared, that if the corporation did not within four years from the passage of that act *commence* the road, it should thenceforth forever cease and the act be null and void; and consequently there being no act authorizing the organization of the company, the check was void for want of consideration. To which the judge answered that the act of 1836 was a *continuation* of the act of 1832, and authorized the organization of the company.

Crocker v. Crane.

2. The judge was requested to charge, that as, in and by the act incorporating the company and the act amending the same, *seventeen* persons are nominated and appointed *commissioners* to receive subscriptions and distribute the stock; and, as by the proof, it was shown that *four* of those persons did not appear or take any part in the matter, that the acts of any number of the commissioners *less than the whole* were *void*, and conferred no rights upon the subscribers to the stock of the company. To which the judge answered, that the commissioners were *ministerial officers*, and as the discharge of their duties did not involve the exercise of *judicial powers*, strictly so called, although they exercised a discretion as to the *amount* and the *persons* to whom the stock should be distributed, a *majority* could act, and a concurrence of *all* the commissioners was not necessary.

3. The judge was requested to charge that the commissioners, having received *uncurrent money* from some, and *checks* from other subscribers for the stock of the company, had not complied with the requirement of the fourth section of the act of 1832, incorporating the company, which declares that "the commissioners shall receive no subscriptions, unless two dollars on each share subscribed be paid at the time of subscription;" and consequently, the check in question having been received in violation of the statute, it was void, and the defendant acquired no right to any of the stock of the company. To which the judge answered, that this was a question of fact for the jury; that if they were satisfied that the checks were received in the ordinary course of business as a cash payment, without an agreement to give credit to the subscribers, it would be sufficient payment, within the terms of the statute.

4. The judge was requested to charge, that the conduct of the commissioner, in procuring subscribers to promote the views of the person who deposited money with him, and his subsequent acts in furtherance of the same object, rendered the whole proceedings void, and rescinded the contract of the defendant. To which the judge answered, that although the conduct of the commissioner might render

Crocker v. Crane.

him personally responsible, and affect the title of those for whom he obtained stock, still it did not invalidate the acts of the other commissioners who, for aught that appeared, acted with entire good faith; that it was the intention of the commissioners that the defendant should receive the full amount of his subscription, and the stock was awarded to him accordingly; that he had received and voted upon it, and could not allege in defence to this action that *others* were defrauded, or that he would have realized a greater advantage by a distribution to other persons than those for whom the commissioner, whose conduct was complained of, was interested.

The jury, under the decisions thus made, found a verdict for the plaintiffs for \$2107 11. The defendant having tendered a *bill of exceptions*, which was duly signed, moved for a new trial. The cause was argued by

A. Taber & S. Stevens, for the defendant.

M. T. Reynolds, for the plaintiffs.

Points made and argued on the part of the defendant :

I. The plaintiffs should have been nonsuited : 1. For the *variance* between the *bill of particulars* and the proof in respect to the number of endorsers; and 2. For want of evidence that the notice of protest was sent to the *place of residence* of the defendant.

II. The act of 1832, by its own terms, became *void*, in consequence of the construction of the road not being commenced *within four years*. The act of 1836 does not profess to *revive* it, and therefore it was not revived; consequently, the whole transaction of *July, 1836*, was without legal authority, and void.

III. The *subscription* and *distribution* of the stock was void, because *all* the commissioners did not unite in doing the acts, which were done. When power is conferred by statute upon *several*, all must meet, though a *majority* may decide.

IV. The check in question was void : 1. It was taken by color of law, but without authority ; and 2. There was no party *payee* who could legally receive it.

V. The check was void, also, because taken *in lieu of money* in direct violation of the statute. It gave no right to the stock, and was wholly without consideration.

VI. The *fraud* practiced by *one* of the commissioners upon his co-commissioners and upon the subscribers, authorized the defendant to rescind his subscription.

VII. The turning out of the check to the plaintiffs in payment of the *private debt* of James Van Buren, (probably one of the directors,) was such a gross misapplication as will prevent a recovery by the plaintiffs.

By the Court, COWEN, J. The first subdivision of the plaintiff's first point does not arise. The declaration and bill of particulars delivered with it are not set out in the bill of exceptions, so that we can judge whether there was a variance, or not, from the check given in evidence.

As to the second subdivision of the first point, the notary's certificate is not set forth. *Non constat*, but it was well on its face, and sufficient to prove notice. If the objection mean that independent proof should have been given that the notice was properly directed, that is a mistake. The certificate is, *per se, prima facie* sufficient evidence that it was properly directed. 2 R. S. 212, § 46, 2d ed.

The second point of the defendant is not well taken. The act of 1836 does not say in terms that the first act shall be revived ; but it does the same thing by implication. The first act had expired by its own provision, because the road had not been commenced within four years. The last act declares that the time shall be extended, and then professes to amend the former act, and repeal parts of it. The meaning of the legislature is perfectly plain ; and apt words are not essential. Dwarris on Statutes, 702, 3.

As to the defendant's *third* and *fourth* points, the receiving of subscriptions was not a *ministerial* act. Any one had a right to subscribe and pay in the four per cent. Such an act might be allowed by an agent or deputy appointed by

Crooker v. Crane.

the commissioners, or by one, without authority at the time; the acts being afterwards ratified by the board. But the question is different as to the *distribution of stock*. The fourth section provides, that "if more than \$650,000 shall have been subscribed, they (the commissioners) shall distribute the said stock among the several subscribers, in such manner as they shall deem most conducive to the interests of the said corporation." Statutes, Sess. of 1832, p. 191. Here, it appears to me, is a *judicial power* vested in the commissioners; a power to exercise a discretion founded on such considerations as may appear to them beneficial to the company's interests. These may be various and important, while the decision is, in its nature, beyond the reach of appeal. *Walker v. Devereaux*, 4 Paige, 229. And see *The People ex rel. Case v. Collins*, 19 Wendell, 56, 60, &c. Then it has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a *majority* shall constitute a quorum, all must be present to hear and consult, though a majority may then decide. *Ex parte Rogers*, 7 Cowen, 526, 529, 530, and the cases there cited, and see note (a). The statute, 2 R. S. 458, § 27, 2d ed. was passed in affirmation of this rule, which it adopts in terms. The rule has been applied to ordinary commissioners of highways, *Babcock v. Lamb*, 1 Cowen, 238, and a statute was thought necessary to qualify the rule in this case, which has been done slightly, by 1 R. S. 520, § 129, 2d ed.

The statute in question, § 1, provides that Heman M'Clure, Benjamin Walworth, John Crane and such other persons as shall become stockholders shall constitute the corporation, and if no stock was distributed, there is no corporation. The objection that there was no party payee who could legally receive the check, is unfounded in fact. *Saxton* was a competent payee. But the awarding and distributing of the stock by the proper authority was a condition precedent to the existence of the corporation. This is the view taken by the present chancellor in *Walker v. Devereaux*, 4 Paige, 229, upon a statute with similar provisions as to the mode of organization, under which the *Utica &*

Crocker v. Crane.

Schenectady rail road company was constituted, and which view I am satisfied is perfectly sound. The distribution being conducted throughout by a number of commissioners not sufficient to constitute a legal board, was *coram non jure*, and void. It follows that there never was any corporation. The defendant got no stock, and all consideration for the check has failed. See also the reasoning of Lansing, Chancellor, in *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Err. 94, 5.

With regard to the *fifth* point, the commissioners, in a matter wherein they had a right to act, received *uncurrent money* and *endorsed checks*, instead of *cash* for the percentage, required by the act to be paid at the time of the subscription. I can not collect from the evidence that they made any serious stand on the condition that cash should be paid. By cash I mean specie, or its equivalent in current bills of specie paying banks. They received uncurrent money for a while, and at last resolved to receive checks, lending an easy ear to the presumption urged upon them, that a drawer of a check had current funds in place. I can not feel a doubt on reading the evidence that the whole was a mere evasion of the statute. In that I certainly differ from the jury to whom the question was left. It ought not to have been left to a jury, whether knowingly paying and receiving uncurrent money was a compliance with the mandate of the legislature. At what discount the money stood does not appear. It must I think have been wretchedly worthless, to have been uncurrent amid the inflations of 1836. The checks were received mainly because they were preferred to this uncurrent money. There was some question started whether the drawers had funds, those very drawers too who had, it seems, nothing but uncurrent money to pay. A good endorser was required; but looking at the whole transaction, this was evidently a substitution of individual credit for cash payment. Giving time of payment was talked of, inasmuch as the money would not be wanted for immediate use. I think the jury fell into a plain mistake when, under the charge of the judge, they pronounced this the ordinary course of receiving checks, to

Crooker v. Crane.

effectuate a cash payment. Why are they taken as cash in the ordinary course of business? Because they are a mere transfer of money which a man has at his banker's. I do not deny that receiving an occasional check might have been a fair substitute. But checks being crowded on the commissioners in a mass, because no subscriber had any thing but uncurrent money to pay, is another matter. The commissioners might as well have received any thing else which an accommodating construction would call an equivalent for cash. But the statute did not allow a mere equivalent. It would not, for instance, have recognized a mortgage or stocks as a payment, of whatever value. The commissioners were here acting *ministerially*, and if they have not pursued the purposes of the statute, their acts can not be sustained.

I am therefore strongly inclined to the opinion that the check in question was void, as contrary to the policy of the statute. Nor can there be any doubt, I imagine, that the contemplated corporation, if I am right as to the facts, failed of going into existence, for want of the proper payments as a *condition precedent*. Such is the doctrine laid down by Chancellor Lansing in *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Err. 94, 5, and recognized by this court in *Goshen Turnpike Co. v. Hurtin*, 9 Johns. R. 217: and see *Highland T. P. Co. v. McKean*, 11 Johns. R. 98, and *Dutchess Cotton Manufactory v. Davis*, 14 Johns. R. 238. These cases go farther. Each subscriber must pay as a condition to his own liability attaching. Payment was a requisite which the commissioners could not waive. *Starr v. Scott*, 8 Conn. R. 483.

As to the *sixth* point: the *fraud* practiced by one of the commissioners was, I think, properly treated by the judge as not vitiating the whole proceeding, if it had been otherwise regular. He deceived his co-commissioners, who took it upon them to distribute the stock. In this they acted *judicially*: and had they been a quorum, their judgment would have been binding, notwithstanding the fraud. A judgment is sometimes void where it is got up collusively, and with a view to cheat a third person, who has no chance of being

Crooker v. Crane.

heard. It is then void in respect to that person, who may impeach it in a collateral suit. But it is never holden void as to a party who has legal notice and may be heard to contest it, even though the judges and party complaining may be defrauded either in respect to the form of proceeding or the merits. The party injured being before the court, must take his remedy there in the course of the suit. That a stranger may impeach a covinous or collusive judgment, see *The Duchess of Kingston's case*, *passim*, 11 St. Tr. 198, Hargr. ed. and especially p. 262. But that a party or privy shall not, see 1 Phil. Ev. 7th Lond. ed. 346; *Peck v. Woodbridge*, 3 Day, 30; and note (c) to *Doe, dem. Day v. Haddon*, 3 Dougl. 312, 313. Where, in a proceeding like that now in question, a quorum of commissioners assemble and the payments are regularly made, the board acquire jurisdiction, and the subscribers are to be considered as parties to the adjudication by which the stock is distributed.

The objection that the check was misapplied, being turned out by Van Buren, may be true; but it would not vitiate it, if it was valid in its concoction, or if it became valid by the due organization of the company. In such an event, it could not be material to the defendant in what name the collection was enforced. He would obtain his stock and pay the stipulated compensation; and the directors would be accountable for the amount of the check, at least Van Buren would be, if, as suggested, he was one of them. The point, however, does not appear to have been raised at the trial.

But as the corporation do not appear to have been organized, there having been no *quorum* to distribute the stock; and as the receiving of the uncurrent money and checks was in fraud of the statute, the check in question is void, both as wanting a consideration, and as an act which violated the policy of the law.

New trial granted; costs to abide the event.

Ball v. Shell.

BALL vs. SHELL.

An execution which would be deemed dormant as against a judgment creditor, is fraudulent as against a subsequent bona fide purchaser.

THIS was an action of *trespass*, tried in October, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The action was brought for the taking of a span of horses, a waggon and sleigh, purchased by the plaintiff at a public auction held by one *Jacob Settle, jun.* on the first February, 1836. The property was taken from the possession of the plaintiff on the 9th June, 1836, by a deputy sheriff, who had levied upon it by virtue of an execution in favor of the now defendant against *Settle* and two others on 24th April, 1835, and permitted it to remain in the possession of *Settle*, with the assent of the plaintiff in the execution. The judge ruled that such execution would be deemed *dormant* as against a subsequent execution, and that in his opinion it was equally inoperative as against a subsequent *bona fide* purchaser. The defendant also showed that in the autumn of 1835, *Settle* assigned the property in question to one *Silas Brown*, for the benefit of his creditors, and offered to prove that such assignment was fraudulent. The plaintiff objected to the evidence as irrelevant, and the objection was sustained by the judge. The defendant failed in showing that the plaintiff had *notice* of the levy. The jury, under the charge of the judge, found a verdict for the plaintiff. The defendant moves for a new trial.

J. McKown, for the defendant.

S. Stevens, for the plaintiff.

By the Court, NELSON, Ch. J. It is clear that the execution of the defendant would have been deemed fraudulent as against a *judgment creditor*, *Kellogg v. Griffin*, 17 Johns. R. 274; and the reason of the principle governing in that case applies with equal force in favor of a *bona fide* pur-

Hinds v. Doubleday.

chaser. Nor is the application new. *Bailey v. Bunning*, 1 Lev. 174. Ross on Vendors, 169. 1 Maule & Selw. 711.

Whether *Settle* sold the property at the auction for himself, or as the agent of *Brown*, to whom it is alleged he had collusively assigned it, cannot affect the plaintiff, for a *bona fide* purchaser of a fraudulent *vendee* stands in as good a situation as if he had purchased from the *vendor*. The plaintiff here obtained all the title which *Settle* had, and which was sufficient when relieved from the execution. The *delay* effected that as it respects a *bona fide* purchaser.

New trial denied.

HINDS vs. DOUBLEDAY & MCINTOSH.

On the election or appointment of a *new sheriff*, and the service of a certificate of the county clerk that the *new sheriff* has qualified and given the security required by law, the powers of the *old sheriff* cease within ten days after the service of such certificate, and all *prisoners* who are not assigned within that term, are at liberty to go at large; the *new sheriff* has no control over them, and the powers of the *old sheriff* are at an end. The latter cannot in such case, even maintain an action on a bond for the liberties given by a prisoner not assigned.

In an action on a bond for the liberties, a plea that the prisoner remained a true and faithful prisoner to be a valid bar, must cover the whole time during which the sheriff remained liable; it must, as in this case, be not only whilst he continued in office, and until a successor was appointed, but until the prisoners were assigned, or the expiration of ten days after the service of the certificate of the county clerk.

A plea that the prisoner escaped *after* the assignment by the *old* to the *new sheriff*, is a good bar to an action on a bond for the limits, and it is no answer to such plea that the prisoner was *not assigned* by the *old sheriff*, where no excuse for the omission is offered. Whether the omission to assign can be excused, *quere*.

If the *old sheriff* has a right of action on the limit bond, a recovery against the *new sheriff* for the *same escape*, is no bar. Nor is a *voluntary return* of the prisoner before suit brought *against the sheriff*, a bar; a limit bond is not strictly a *bond of indemnity*; the sheriff being liable to an action when an escape happens, may forthwith bring his suit.

In a suit on a bond for the liberties, it is no defence that no action was brought against the sheriff, *within a year after the escape*; the *sheriff* may avail himself of such short limitation in an action against him, but not the *obligors* of the bond.

Hinds v. Doubleday.

ESCAPE ; bond for the liberties ; old and new sheriff. The plaintiff, as *late* sheriff of the county of Broome, declared against the defendants on a bond for the limits, in the penal sum of \$200, bearing date 4th March, 1831. The bond, after reciting that McIntosh was in custody on a ca. sa. at the suit of J. Bacon and others, for \$89 30, and had been admitted to the liberties of the county, was conditioned that he should remain a true and faithful prisoner, and should not at any time escape, or go without the limits of the jail, until discharged by due course of law. The breach assigned was that McIntosh escaped. The defendants in their *third* plea alleged that *whilst the plaintiff continued in office* as sheriff, and until the appointment of a successor, McIntosh remained a true and faithful prisoner, nor did he during such period go at large, &c. To this plea the plaintiff replied that McIntosh did go at large before he was discharged by due course of law, concluding to the country. Demurrer and joinder. The defendants *fourthly* pleaded that *before suit* against the plaintiff, on account of any supposed escape, McIntosh *voluntarily returned* to the jail, &c. concluding with a verification. Demurrer and joinder. *Fifthly*, they pleaded that *no suit* was brought against the plaintiff, *within one year* from the time of the supposed escape. Demurrer and joinder. *Sixthly*, they pleaded that on 1st January, 1832, the term of office of the plaintiff, as sheriff, expired, that a *new sheriff*, to wit *James Stoddard, junior*, was elected in his place, who was duly qualified and gave the security required by law ; that the certificate of the clerk of the county, certifying those facts, was duly served on the plaintiff previous to the supposed escape, whereby the powers of the plaintiff as sheriff ceased ; and that afterwards and within ten days and *before* the supposed escape, the plaintiff delivered to *Stoddard*, his successor, the *jail* of the county, and all the *prisoners* then confined therein, and all *process*, &c. and that McIntosh was then a *prisoner* confined in the jail or within the liberties on the said ca. sa. To this plea the plaintiff replied that McIntosh was not *assigned* by him to his successor. Demurrer and joinder. *Seventhly*, they pleaded the same matter as in the *sixth* plea with the

Hinds v. Doubleday.

additional facts, that in January term, 1832, the plaintiffs in the execution upon which McIntosh was in custody, brought a suit against Stoddard, *for the escape of McIntosh after the term of office of the plaintiff had expired*, (which was averred to be the *same identical escape* of which the plaintiff complained,) and such proceedings were had in that suit, that the plaintiffs therein, in October term, 1832, recovered a judgment, against Stoddard, for \$134 06. To this plea the plaintiff put in the same replication as to the sixth, viz. that McIntosh *was not assigned* by him to his successor. Demurrer and joinder.

S. Stevens, for the plaintiff. An action lies at the suit of the *old* sheriff, for the *escape* of a prisoner previous to assignment, although after the appointment or election of a *new* sheriff. 20 Johns. R. 64. The *new* sheriff is not liable for such escape. 13 Wendell, 500. It is no defence that the sheriff has not been sued, nor is it an answer by the prisoner that he voluntarily returned before the sheriff was sued. The sheriff may plead such fact in bar of a recovery against him, but the prisoner or his bail cannot avail himself of it. Nor is a recovery against the *new* sheriff a bar to an action by the *old* sheriff.

J. A. Collier, for the defendant. The replication to the *third* plea is bad in not specifying *time* or *place*; this defect is pointed out by special demurrer and therefore must prevail. The *fourth* plea is good; the limit bond is a mere *bond of indemnity*, 10 Johns. R. 563, and a plea of *voluntary return* is expressly authorized by statute. 2 R. S. 435, § 48. So the *fifth* plea is good; it is demurred to specially because it states two facts, viz. that the prisoner did not escape within one year before the commencement of this suit, *and* that no suit was brought against the plaintiff within one year after the escape. The plaintiff might have taken issue upon either of the averments; There was no necessity for a demurrer, nor was the plaintiff bound to demur. 13 Wendell, 633. The *sixth* and *seventh* pleas set up a perfect bar to a recovery, and the replications alleging that the prisoner

Hinds v. Doubleday.

was not assigned are no answer. An *omission of duty* by a public officer can give him no rights. If the plaintiff neglected his duty to assign the *jail* and *prisoners*, the new sheriff might notwithstanding take possession of the jail and assume the charge of the prisoners. The case of *Partridge v. Westervelt*, 13 Wendell, 505, admits that the old sheriff cannot plead his omission of duty. In that case my learned opponent asked, 'Should the action be sustained against the new sheriff, how is he to be indemnified?' Country counsel have answered him, 'borrow your neighbor's bond of indemnity.' After a suit against the new sheriff, the old sheriff cannot be sued for the same escape. 7 Wendell, 455. 2 R. S. 296, § 91.

Stevens in reply. *Venue* and *time* cannot be objected to any pleading of the plaintiff subsequent to the declaration. If a prisoner returns before suit against the sheriff, he may under a plea of *non damnificatus* show the fact in mitigation of damages, but cannot plead it in bar. The omission to assign will not protect the old sheriff against a suit, and being liable to a prosecution, he may bring an action upon the limit bond. The recovery against the new sheriff is no bar; it should have been given in evidence under a plea of *non damnificatus*. Where the jail, prisoners and process, &c. are assigned, the limit bond may be sued by the new sheriff.

By the Court, BRONSON, J. Under the former law, a writ of *discharge* was delivered to the old sheriff, commanding him that by indenture he deliver to his successor, "the county, with the appurtenances, together with the rolls, writs, memorandums, and all other things touching that office which are in his custody;" and thereupon the office of the old sheriff was at an end. 1 R. L. 418, § 1, 4, 5. Notwithstanding the imperative language of the writ, it was said in *Hempstead v. Weed*, 20 Johns. R. 64, that the right of the old sheriff to turn over his prisoners on civil executions to his successor, was for his own safety and security; that the rule was introduced for his benefit, and he might, if he pleased, waive the advantage of it. It was accordingly held,

Hinds v. Doubleday.

that the old sheriff was not chargeable with an escape, when on going out of office, he had by mistake neglected to assign to his successor one of the prisoners on the jail limits; but that the prisoner still remained in his custody, on the principle that when the sheriff has commenced the execution of final process, he may complete it after his office is at an end. In *Partridge v. Westervelt*, 13 Wendell, 500, it was decided, that a prisoner on the jail limits, who had not been assigned to the new sheriff, was not in the custody of the new sheriff, and consequently that he was not chargeable for an escape of the prisoner, although it happened in his time; but that the remedy of the creditor was against the old sheriff, who could not plead his failure to perform his duty as an excuse. In this case, the late chief justice expressed the opinion, that the turning over of prisoners was no longer a privilege which the old sheriff could waive, but that it was now his duty to assign them.

The language of the present statute is certainly imperative in its form—the former sheriff *shall* deliver to his successor the jail and the prisoners. 2 R. S. 438, § 69. Although this language may not be stronger than that in the former writ of *discharge*, I think it not only confers a benefit, but imposes a *duty* on the old sheriff; and I am not prepared to say that he can sue for an escape, where he is driven to the necessity of alleging his own breach of duty by way of making title to the action. But if there can be a good excuse for not assigning, as that a particular prisoner was omitted by mistake, the sheriff should show the excuse.

But the difficulty presents itself in another form. Although under the old law, the sheriff, when he had commenced the execution of final process, might complete it after his office was at an end, and although he may do so still in relation to executions against *property*, yet he cannot, I think, do so where the final process is against the *body* of the debtor. A certificate from the county clerk, that the new sheriff has qualified and given security, has taken the place of the old writ of discharge. 2 R. S. 438, § 67. Upon service of the certificate on the former sheriff, the

Hinds v. Doubleday.

statute declares, that "his powers as such sheriff, except when otherwise expressly provided by law, shall cease;" (§ 68); and I find no provision which will authorize him to continue the execution of process on which any person is in his custody as a prisoner. The exception in the last clause of the 69th section, and the power to proceed, given by the 71st section, are both evidently confined to final process against the *property*, not the *person*, of the debtor. And besides, it is made the duty of the sheriff to deliver to his successor, *the jail* of the county, with its appurtenances, *all the prisoners* then confined in such jail, and *all process*, orders, &c. in his custody, *authorizing or relating to the confinement of such prisoners*. § 69. On reading the 68th, 69th and 71st sections together, I am unable to resist the conclusion, that the legislature intended the powers of the old sheriff in relation to all prisoners in his custody should cease within ten days after the service of a certificate that the new sheriff had entered upon the duties of his office. If the common law power of the old sheriff to continue the execution of final process against the body is taken away by this statute, as I think it is, prisoners who are not assigned within the ten days will be at liberty to go at large. The new sheriff has nothing to do with them, and the power of the old sheriff is at an end. If he cannot enforce the imprisonment by direct means, he cannot do it indirectly, by suing the bond which was given while the restraint was legal.

It remains to apply what has been said to the questions presented on the third, sixth and seventh pleas.

1. The *third* plea is not broad enough to constitute a bar. The allegation is, that *McIntosh* remaining a true and faithful prisoner "during the period when the plaintiff continued in office as such sheriff, and until a successor was appointed in his place." The plaintiff was not in office as sheriff after the certificate was served by the new incumbent; still his power over the prisoners necessarily remained for ten days afterwards, if they were not sooner assigned. The plea, therefore, comes short of showing that *McIntosh* was

Hinds v. Doubleday.

not in the plaintiff's custody at the time of the escape. The second branch of the plea is subject to the same objection.

2. The *sixth* plea states in substance, that before the escape, the plaintiff had been served with the certificate required by the statute; and that within ten days thereafter, and before the escape, the plaintiff delivered the jail and all the prisoners, including *McIntosh*, to *Stoddard*, the new sheriff. This is a good bar. After the plaintiff had delivered the jail and the prisoner, it is obvious that he could have no further authority over him. The new sheriff was then answerable for the safe keeping of the prisoner. The replication is, that *McIntosh* was not assigned. It was the plaintiff's duty to deliver over all the prisoners, and whether he did so or not, his power of restraining them could not continue beyond the ten days. Whether there can be a good excuse for omitting the transfer, need not now be considered, for no excuse whatever is set up by the plaintiff.

The *seventh* plea contains the same matter as the sixth, and there is only one replication to both. The replication is of course equally bad as to both pleas. The additional matter in the seventh plea—that the creditors of *McIntosh* treated him as in custody of the *new* sheriff, and sued and recovered a judgment against the new sheriff for the same escape of which the plaintiff complains, amounts to nothing. If *McIntosh* was in the plaintiff's custody at the time of the escape, the plaintiff has a right of action against the bail, and if the new sheriff has suffered a judgment which he might have avoided, that cannot prejudice the plaintiff. But this additional matter is surplusage merely, and can do no harm. The plea contains enough without it, and the replication does not give a sufficient answer.

3. The *fourth* plea sets up a voluntary return by *McIntosh* to the jail liberties, before any suit was commenced *against the plaintiff*. The plea which the statute authorizes would be, a voluntary return of the prisoner before suit brought *against the bail*, on their bond to the sheriff. 2 R. S. 435, § 48. This section has turned the case of *Barry v. Mandell*, 10 Johns. R. 563, into statute law. The plea is quite wide of the mark.

Wright v. Moore.

But is said that the bond is one of indemnity, and that if there was a return before suit brought against the plaintiff, he cannot have been damaged. This is not strictly a bond of indemnity. When the prisoner escaped, the sheriff was not bound to wait until he was sued, but might immediately take his remedy for a breach of the condition of the bond; and besides, the sheriff is liable to the creditor the moment the escape takes place. He need not wait for an action, but may discharge his liability without it. It does not follow, therefore, that the plaintiff has not been damaged, because he has not been sued. The plea cannot be maintained.

4. By the *fifth* plea the defendants have attempted to avail themselves of the short limitation which the statute has given to *the sheriff* in actions against him for escapes on civil process. 2 R. S. 296, § 21. There is no such limitation in favor of *the bail*. So far as the plea rests on the assumption that this is only a bond of indemnity, it is sufficiently answered in what has been said concerning the fourth plea.

The result is, that the plaintiff is entitled to judgment on the third, fourth and fifth pleas; and the defendants are entitled to judgment on the sixth and seventh pleas.

WRIGHT vs. MOORE.

Where a contract is entered into for the sale of land, by the terms of which the purchaser is to pay \$500 down and enter into immediate possession of the premises, a second instalment to be paid in *ten months*, and the residue at deferred periods, and the vendor is to execute a deed in *two months*; the vendor is entitled to maintain an action of *ejectment* on the default of the purchaser to pay the second instalment, although the first instalment was punctually paid, and the vendor did not before bringing suit tender a deed. The vendor in such case could not maintain *covenant* for the purchase money, but may bring *ejectment*; the remedy of the defendant, if any, is in equity. It seems that in a case like this, *notice to quit*, before bringing suit, is not necessary.

This was an action of *ejectment*, tried at the Niagara circuit in April, 1837, before the Hon. ADDISON GARDNER, then one of the circuit judges.

Wright v. Moore.

On the 29th February, 1836, the parties entered into articles of agreement *under seal*, for the sale and purchase of 106 acres of land. The plaintiff covenanted to *convey* the premises *in fee* to the defendant *by the first day of May then next*, or as soon thereafter as a deed could reasonably be obtained from the Holland Land Company, for the sum of \$3515 14, to be paid as follows: \$500 down, \$1000 on the 22d December then next, and the residue in three annual instalments, "all except the first payment of \$500 to be secured by a bond and mortgage upon the said premises." The defendant on his part covenanted that he would purchase the premises of the plaintiff and pay him therefor the sum, at the times and in the proportions above specified, and secure the same, except the first payment of \$500, by bond and mortgage as above mentioned; and then followed a further covenant on the part of the plaintiff, that the defendant "may have quiet and full possession of the said premises at any time after the payment of the said sum of five hundred dollars, the first payment above mentioned." The defendant paid the sum of \$500, and *took possession* of the premises. The plaintiff obtained his title from the Holland Land Company on the 8th March, 1836. On the 13th July, the defendant having become *insolvent*, transferred all his interest in the contract, together with his other property, for the benefit of his creditors, to *assignees*, who requested the plaintiff to convey the land, and offered to procure the defendant to execute the bond and mortgage according to the terms of the contract; the papers to bear date at any time the plaintiff should elect. The plaintiff refused to comply with this request. About the time the instalment fell due in *December*, the plaintiff demanded payment of the same of the defendant, who declared his inability to pay and said the land would have to go back. In January, 1837, this action was commenced. No evidence was given on the part of the plaintiff of a *tender* by him of a deed, at any time, either to the defendants or his assignees. The jury found a verdict for the plaintiff, and the defendant tendered a *bill of exceptions*, which was duly signed by the circuit judge. The bill gives a history of the trial, setting forth the evidence in

Wright v. Moore.

the case, and concluding in the usual form of a bill of exceptions, the defendant's counsel insisting that the said several matters so given in evidence were sufficient to entitle the defendant to a verdict, and the plaintiff's counsel insisting that they were not sufficient for that purpose, and the judge delivering his opinion that the said several matters so produced and given in evidence were not sufficient to bar the plaintiff of his action; whereupon the plaintiff's counsel excepted. Then follows a clause to this effect: that the judge did *further* declare and deliver his opinion to the jury, that if they believed that the plaintiff demanded the \$1000 payment due on the contract in December, 1836, at or about the time the payment became due, and that the plaintiff was willing to accept the said payment when it became due and give a deed for the premises, the plaintiff was entitled to recover. To which last mentioned opinion, it is stated the defendant's counsel excepted. Upon this bill of exceptions the defendant moved for a new trial.

J. A. Spencer, for the defendant, insisted that the plaintiff was not entitled to maintain this action. By the terms of the agreement the defendant was to pay \$500 down and to enter into the immediate possession of the premises, and the plaintiff was to *convey* the premises in fee, before any further payment was to be made. The payment of \$500 was made. The execution of the deed was a *condition precedent* to any thing further being done by the defendant. The plaintiff had the ability to perform on his part and neglected to do so. He surely could not under these circumstances maintain an *action of covenant* for the payment of the purchase money, and upon the same principle he is not entitled to maintain an *action of ejectment*. He has received \$500, and ought not in justice to be permitted to retain that sum and also maintain this action. The defendant is in possession by the agreement of the plaintiff, who should be driven into a court of equity for his remedy, where such terms may be imposed as the equity of the case requires. At all events the plaintiff should have tendered a *deed*, and required performance on the part of the defendant before bringing this suit.

A. *Taber*, for the plaintiff.

By the Court, COWEN, J. Independent of the covenant that the defendant might take possession, there can be no doubt that the plaintiff was entitled to recover. *Jackson, ex dem Whitbeck, v. Deyo*, 3 Johns. R. 422. I admit he could not, on the case made out, recover the purchase money in an action of covenant; he was in default for not tendering himself to execute a deed on the first of May, and his remedy was gone at law. *West v. Emmens*, 5 Johns. R. 179. *Franchot v. Leach*, 5 Cowen, 506, 508. The defendant was without fault, for he could not give the security by bond and mortgage till the plaintiff had first given him a deed. *Id. id.* The remedy of the plaintiff to collect the money, if he had any, lay in a court of chancery. But although the plaintiff could not recover in covenant, the defendant could have no title at law, and would be regarded as a trespasser. *Jackson, ex dem. Simmons, v. Chase*, 2 Johns. R. 84. *Jackson, ex dem. Smith, v. Pierce*, *id.* 221. And see *Robinson v. Campbell*, 3 Wheat. 218. These cases and many others hold that though the defendant's equitable title may be clear and perfect, its enforcement belongs exclusively to chancery.

If the defendant have any legal right to hold possession it must be in virtue of the agreement, that he might have possession after paying the \$500. That sum he paid and took possession; and now claims to hold at law absolutely, and indefinitely, because the plaintiff has not complied with a condition, merely technical. The question of notice to quit does not arise between vendor and vendee. *Jackson, ex dem. Shipley, v. Moncrief*, 5 Wendell, 26, 29. Beside, it was not sought to be raised on the trial; and we must, therefore, take the case as if notice had been given, provided any were necessary. The simple stipulation that the defendant might take possession, is certainly not equivalent in law to a deed, either in fee or for life, or any definite time. At the utmost, it can do no more at law than create a *quasi* tenancy at will. Taken in its strict import, it is a mere license. The language is, "he may have full and quiet pos-

Wright v. Moore.

session," and it stops there. There is nothing in it which *ex vi termini* entitles the defendant to hold for a day, after the license is revoked. So much for the legal effect of the agreement. It is merely executory, and looks for the passing of the legal title to a future day. The defendant pays a small portion less than one-sixth; takes possession, avows his inability to pay any more, becomes insolvent, assigns his estate, and on a claim that he should restore possession, sets the plaintiff at defiance; and claims (virtually) a fee. If he succeed, he will certainly have the merit of introducing a new head into the system of conveyancing.

If any thing be implied from this kind of covenants, in connection with the legal license to take possession, it can be nothing more than that the defendant shall hold so long as he continues to keep up all such payments, as may be legally or equitably due. Such I apprehend is the real intention of the parties, when they insert such a license. Without it, the defendant would, we have seen, be a trespasser at law; and as he intends to pay, it is but fair that he should be protected. Such a provision is not unusual and even a court of law would struggle to give it effect, according to the real intention, though it might be inaptly expressed. More than that, however, we ought not to do. When the defendant declares, as here, that he can not pay, and that the land must probably revert, there is, it appears to me, an end of all implied understanding that the possession should continue. A court of equity would, after that feel reluctant to interfere and protect the possession, even on the defendant changing his mind and offering to pay. Of course it would not decree a conveyance without full payment. But for a court of law, which can impose no conditions, and can act only on the legal title, to deny a restoration of possession to the vendor, would result in downright iniquity. The case of *Jackson, ex dem. Shipley v. Moncrief*, 5 Wendell, 26, comes very near the present. The defendant there held under a contract of purchase, and took possession with the vendor's consent; but the purchaser had made default in payment. Chief Justice Savage did look into the equitable rights of the parties, and found that the

The People v. Thompson.

defendant had no title, even in this view. But he is very far from admitting that the consent to take possession would protect the defendant at law, even if the parties had so conducted as to save his equitable right. On the contrary, I understand him to deny that such conduct could, in any view, vary the question in an action of ejectment.

The plaintiff being in fault, the defendant has his remedy at law for damages on the covenant. This is his only relief short of chancery.

I have considered the question as if the plaintiff had been technically in default, for not offering a deed at the day. Nothing of the offer appears in the bill of exceptions; nor was any objection specifically taken on that account. Had it been, the offer might have been shown, when the defendant must have been adjudged without the least right at law, even to defend himself against an action of covenant. The exception, therefore, which is general against the plaintiff's right to recover, does not reach the only points raised by the defendant's counsel, on the motion for a new trial. It is clear, however, that a court of law must run into the wildest injustice, should they decide that a defence in an action of covenant by the vendor should in all cases be an answer to ejectment.

The decision at the circuit was right, and a new trial must be denied.

THE PEOPLE, *ex relatione* Taylor and others, vs. THOMPSON and others.

Where to an information in the nature of a *quo warranto* filed against individuals, calling upon them to show cause by what warrant they exercise the franchise of maintaining a bridge across a navigable river and exacting toll from passengers, the defendants answer that they do so by virtue of an act of the legislature, authorizing the erection of a bridge in a specific form, and that they have in all respects conformed to the requirements of the act granting the franchise, upon which allegation issue is taken and found against them by the jury, judgment of ouster follows of course.

The court will not in such case deem the verdict imperfect, and refuse to render judgment, because the jury have not found that the variation or

The People v. Thomson.

departure from the requirements of the statute was in a point *material*, or that it was the *wanton act* of the grantees, or that it was *productive of injury to the public*. If any *excuse* existed proper for the consideration of the jury or of the court, which might have produced a favorable result to the defendants, it was *held*, it should have been alleged by way of pleading, and placed upon the record, so that the court might have passed upon its sufficiency; but where the defendants placed their defence, as in this case, upon a *strict compliance* with the requirements of the statute creating the franchise, and there was no exception taken as to the rejection of evidence or as to the charge of the judge, the court refused to make any intentions in favor of the defendants.

It was further *held*, that this was not a *private franchise*, but was a franchise of a *public nature*, in which the public at large had an interest, and that an information in the nature of a *quo warranto* might be filed in the name of the people on the relation of any aggrieved citizen; that in a case of this kind a *quo warranto*, or information in the nature of a *quo warranto*, was the appropriate remedy, and that it was not taken away by the fact that a *bond* had been executed as security for the faithful performance of the conditions upon which the grant was made; such bond being merely cumulative.

It was further *held*, although the bridge was built in conformity to the requirements of the act granting the franchise, and so continued for the space of twenty-nine years, still it appearing that for *ten years* subsequent to such time, the grantees had failed to comply with such requirements—that the conditions prescribed were *continuing conditions*, that the non-compliance with them was a *misuser*, and that the defendants had incurred a *forfeiture* of the franchise.

INFORMATION in the nature of a *quo warranto*. The attorney general in October term, 1835, filed an information charging the defendants with claiming, using and exercising without any lawful warrant, grant or charter, the *liberties, privileges and franchises* of having and maintaining a *bridge* over and across *Harlaem river*, from the city and county of New York to the town of Westchester, in the county of Westchester, the Harlaem river being a public navigable river, in which the tide ebbs and flows; and of asking, demanding and taking certain *tolls* and duties of and from all persons crossing, passing over, or using the said bridge. To which the defendants *pleaded* that by the act of the legislature of this state, passed 31st March, 1790, *Lewis Morris* and his heirs or *assigns* were authorized to build a bridge from Harlaem across Harlaem river to Morristania, and that by such act it was directed that the bridge should not be less than *thirty feet in width*, and that between the cen-

The People v. Thompson.

the arches thereof there should be *an opening not less than twenty-five feet*, over which there should be a *draw* not less than twelve feet, for the free passage of vessels; and that by the act Lewis Morris and his heirs or assigns were authorized for and during the term of sixty years, to ask, demand and take for the use of the bridge, a *toll* not exceeding the following rates, to wit, (setting forth the tariff of tolls as established by the act.) The defendant then alleged that by another act of the legislature, passed 24th March, 1795, the width of the bridge was required to be *only twenty-four feet*; that on the 8th October, 1796, *John B. Coles* became the assignee of *Lewis Morris*, and became vested with all and singular the rights of Morris in respect to the building of the bridge, and the having and enjoying the privileges, &c., granted by the act of 31st March, 1790; that previous to the 30th March, 1797, to wit, on the 1st November, 1796, Coles at his own expense built a bridge from *Harlaem* across *Harlaem* river to *Morrissania*, the *width* of which was and ever since hath been, and still is *not less than twenty-four feet*, and *between the centre arches* thereof there was and ever since hath been, and still is *an opening not less than twenty-five feet*, over which there was and ever since has been, and still is a *draw not less than twelve feet*, for the free passage of vessels: upon this last allegation as to the building of the bridge and the *dimensions* thereof in its several parts, its *width*, the *opening* between the centre arches, and the size of the *draw*, the attorney general, in one of his replications, took issue, (which issue is designated as the *second issue* in the finding of the jury, hereinafter mentioned.) The defendants also averred, that on the 1st July, 1804, Coles transferred and conveyed divers *shares and portions* of his right, &c., in and to the said bridge, and the liberties, privileges and franchises thereof to divers persons, and that they the defendants now severally own in their own rights respectively certain of the said shares or portions; the said term of *sixty years* not yet having expired; and that the bridge since its erection has been kept and maintained, and still is kept and maintained by the said Coles and his assigns, at his and their own expense, in good and sufficient repair.

The People v. Thompson.

There were various other facts pleaded besides those above stated, and a variety of issues, both of law and fact, joined, which with one exception it is not deemed necessary here to particularize. That exception is the following: The attorney general in his replication set forth, in *hæc verba*, the act of 24th March, 1795, pleaded by the defendants for the purpose of showing that the width of the bridge might be reduced to *twenty-four feet*. This act commences by reciting, that by the act of 31st March, 1790, Lewis Morris was authorized to build a bridge across the Harlaem river, and for the term of sixty years to take tolls, at certain rates; that Morris had assigned his right to build the bridge, and that proposals had been made by *John B. Coles* to the assignees of Morris to raise a *dam of stone* for the purpose of erecting mills thereon, and to be the *foundation of the bridge aforesaid*. It then *enacts*, among other things, that John B. Coles may erect such *dam*, and may make and keep in repair a *lock of the width of eight feet*, providing a sufficient person to attend the same to prevent delay in passing the lock with vessels, and imposing a *penalty of ten pounds* for not keeping the lock in repair, or for not furnishing sufficient attendance thereat. It enacts that the *width of the bridge* to be erected shall not be less than *twenty-four feet*; and it requires that John B. Coles shall give security to the treasurer of the state in the penal sum of £4000, conditioned that he or his assignee will erect and *complete* the bridge within four years from the passage of the act, and that he or his assigns will keep the same *in good repair* during the term of sixty years. After setting forth this act, the attorney general, by way of *replication*, averred that neither Coles or his heirs or assigns had at any time since the passage of the act given such security. Upon which the defendants took issue.

The cause was tried upon the *issues of fact* joined, and a verdict found against the defendants. Whereupon the cause was brought before the court *in bank*, upon the *circuit roll* and the *minutes of the clerk of the circuit*, and the attorney general moved for judgment of ouster. The *minutes of the clerk of the circuit* conclude in these words:

The People v. Thompson.

"The jury, as to all the issues except the *second*, find for the defendants; and *as to the second (issue,)* they find that said bridge was built originally in conformity with the requisitions of the statute, but said jury find that at all times since the year 1825, until the commencement of this suit, there was not an opening between the centre arches of said bridge of the width of twenty-five feet, as is alleged in the plea of the said defendants, but that at all times since the year 1825, to the commencement of this suit, said opening was of less width than twenty-five feet; and as to all the other matters embraced in said second issue, except as to the width of said opening, said jury find for the defendants."

S. Beardsley, (attorney general,) for the people, contended that the verdict was in *form* sufficient. That a jury cannot be compelled to answer the whole of any issue embracing several particulars; they have a right to find a *special verdict*, and have done so in this case, answering to all the questions in dispute upon the *second issue* joined between the parties. The matter of the verdict was distinctly in issue: the defendants alleged not only that the bridge was built of certain dimensions, but that it continued in the state in which it was built. The verdict finds that the opening between the centre arches of the width required by the act had not existed since 1825, that is, that the diminution was owing to the state of the structure, and not that it was occasioned by a mere accidental or extraneous cause. It is a finding under the charge of the judge as to the legal import of the issue and of the evidence requisite to support it. The charge must be presumed to have been correct; neither party having excepted to it. If a mere obstruction, not forming part of the bridge, and permitted to exist, were sufficient to contradict the plea, the finding embraces it—the jury say the opening was not twenty-five feet; but it was contended by the defendants, and charged by the judge, that the opening was to be measured according to the parts of the structure, that is, the diminution must be by something forming part of the bridge, and that a diminution by

The People v. Thompson.

any thing not part of the bridge, was not sufficient to contradict the plea. The verdict has negatived the fact that the diminution was caused by a mere temporary obstruction or nuisance; it imports that it was owing to the state of the structure, and that such diminution had existed since 1825 until suit brought. The verdict also imports that the diminution was *material*, if its *materiality* be a proper subject of inquiry when the statute has fixed the *minimum*, declaring that there shall be an opening between the arches of *not less than twenty-five feet*. This, it is contended, *prima facie* settles the question. The statute having fixed the *minimum*, the smallest deviation is material, and should be so considered by the courts. If a legislative minimum may be disregarded, so may a judicial minimum; and what is now adjudged to be immaterial, may hereafter be extended by other tribunals, until at length no opening whatever between the arches will be required. Should it, however, be held that the jury were authorized to disregard an *immaterial deviation*, then the legal presumption is that they were so instructed by the judge. In fact, he did so charge as to the width of the *draw*, which was slightly less than twelve feet. The diminution of the opening was *six feet*. In short, the verdict finds a violation of the act, under which the defendants claim, in a point *material*, and a continuance thereof for ten years. No *excuse* exists for this non-compliance with the act, and none is pretended. Had the bridge been destroyed by a tempest, and the defendants had proceeded to rebuild it with reasonable diligence, and it had not been completed when the information was filed, such fact could and would have been pleaded. So, if by any other natural cause beyond the prevention of man, the piers of the arches had slipped and approached each other so as to diminish the required opening, it might have been pleaded; but nothing of the kind is pretended. The case presents a clear inexcusable violation of the act, and the defendants have forfeited their franchise.

The counsel further insisted, that by diminishing the width of the opening between the centre arches, contrary to the *minimum* limit, and express interdiction of the statute

The People v. Thompson.

creating the franchises, the defendants have forfeited them by *misuser* and breach of condition in law. The franchise to build a bridge over a navigable river and to *take toll* for passing over the same is granted upon public consideration and for public benefit. It therefore imposes a *charge* upon the grantee, the performance of which is an *implied condition* of his grant. Comyn's Dig. tit. Toll C. *Lord Pelham v. Pickersgill*, 1 T. R. 666. *Warrington v. Mosely*, 4 Mod. 319. The defendants in this case, to uphold their defence or title, must deny that this franchise is subject to a *condition concurrent and continuing*, that it shall conform to the requirements which the legislature have seen proper to impose for the public benefit. The franchise was granted in derogation of public right. The language of the act is explicit, that authority is given only to build a bridge of a certain specified description. Unless a bridge is built in conformity to the original act, or the act amending that first passed on the subject, no right to take toll or to maintain the bridge is given. The building of the bridge according to the requirements of the statute was clearly an implied condition, and had it been built originally, in the state in which it has been since 1825, the franchise of maintaining it and taking toll, would never have vested. Did the *condition* that the bridge should conform to the statute terminate with its original erection? All franchises founded on promoting public convenience, or infringing upon public right, are subject to the *implied condition* that they shall be used, and used in conformity to the terms of the grant by which they are created; and *nonuser* or *misuser* are grounds of forfeiture, *Angel & Ames on Corp.* 510, and cases there cited; per *Lord Holt*, in *City of London v. Van Acre*, 271; "for all franchises are granted on condition that they shall be only executed according to the grant, and if they *neglect to perform the terms*, the patents may be repealed by *sci. fa.*" This was said in relation to acts *long subsequent* to the creation of the franchise. See 1 *Ld. Raym.* 499, S. C. In the same case, *Lord Holt* says, that the fact that the party is subject to *indictment* will not prevent the *forfeiture* of the franchise. See also

The People v. Thompson.

Comyn's Dig. tit. Franchise, G. 3; tit. Condition, R.; tit. Liberties, C., and 2 Inst. 219, 220. Indeed the idea of a *continuing condition*, is inseparable from that of a franchise granted upon condition of public service. The protection of the public, upon which is founded the implication of a condition originally, equally requires the implying of a continuing condition. The position that you may obtain a franchise of this kind by complying with the requirements of the law when you build the bridge, and may claim the right to use such franchise, although you *alter* the bridge the next day, is not warranted by any legal principle. The duty to build a bridge of a certain description, implies an obligation that it shall continue in the form in which it is built, so far as the act of man can ensure it. Such is the only construction that can be put upon the act granting the franchise, and such manifestly was the understanding of it by the counsel of the defendants when they interposed their pleas. They aver not only that the bridge was built in conformity to the requirements of the act, but that the *width between the centre arches was, ever since hath been, and still is* not less than twenty-four feet; thus fully admitting that the franchise was subject to a continuing condition, concurrent with the benefits to be enjoyed, and carrying the latter away with a breach of the condition. It is not to be said that the *misuser* to forfeit a franchise, can only be in that which disqualifies the subject of the franchise from answering its direct object; as if this bridge had been left in an impassible state. That would be in the nature of a *nonuser*. A misuser *ex vi termini*, implies using or abusing the franchise, so as to create some injury without its direct scope and purpose, as in this case. Here, although a bridge sufficient perhaps for the accommodation of those passing *over* it was maintained, the passage *under* it was not kept open according to the requirements of the act, by which *the right of navigation* was interfered with, contrary to the provisions of the statute for the protection of the public in that behalf. Under the pleadings in the case, the attorney general was not at liberty to show an interruption to the navigation by means of the diminution in the opening between the arches

The People v. Thompson.

of the bridge, and nothing, therefore, is to be inferred from the absence of proof on the subject. Whatever the extent of the rule of law may be, as to *what misuser* shall create a forfeiture in acts done by the holders of a franchise in its use *contrary to the general laws of the state*, it may be safely assumed that when the franchise is used *contrary to the very terms of the statute* creating it, transgressing what is clearly forbidden, such is a fatal misuser. If any condition is implied in the grant of a franchise, it must at least be, that the requirements of the grant itself shall not be openly and palpably for a succession of years violated, and that without necessity, excuse or apology. It is no answer to say that the parties may be proceeded against by *indictment*, if the bridge is *not continued* in the form in which it was originally erected; because the same answer might be made if a *forfeiture* was sought for its original construction in a form different from that prescribed. If it be argued that the rule contended for, of a *continuing condition*, will operate harshly, and be of difficult application in determining what extent of deviation shall work a forfeiture, it is answered, that the courts have nothing to do with the harshness or difficulty of a rule of law. The parties can always guard against its application by performing their obligations; and should it happen that meritorious holders of a franchise should be ousted by a rigid rule of law, the people having resumed the franchise, the legislature would re-grant it, if required by the principles of equity and justice.

G. Griffin for the defendants, insisted, that it was at least doubtful, whether in this state, a *quo warranto* lies to take away from an individual, a *private franchise*, once lawfully vested in him, on the ground of subsequent *misuser*. According to the theory of the English law, as resting on the *dicta* of elementary writers, and sometimes even of judges, it does lie for such a purpose; but even in England, the *quo warranto* process has never been *practically applied* to such a case. He next contended, that if such was the common law of England, it had not been adopted here; that the law of *quo warranto*, with us, rested entirely upon statutory provi-

The People v. Thompson.

sions, and that the various legislative enactments existing upon the subject, did not embrace *private franchises*. He argued that there were good reasons why they should not be subject to this process. If the doctrine on the other side was correct, a turnpike road partially out of repair, a plank of a toll bridge decayed, or a bar of a railroad track loose, would produce a *forfeiture* of the franchises granted to individuals, who, on the faith of the state, had invested large sums of money in enterprises, by which the public were greatly benefitted. The slightest transgression and however brief its continuance, would produce the effect, and nothing could prevent the consequence. There is no necessity for this; the public may be secured against the misuser of private franchises, by remedies less severe, and more congenial to the spirit of our laws. The owners of turnpike roads, bridges and rail roads, if in fault, may be *indicted*, fined and imprisoned; a *mandamus* may be issued, compelling the performance of the incumbent duty, as was done in *Rea v. Swan & Wye Rail Road Company*, 2 Bar. & Ald. 646, or a *private action* may be brought at the suit of an individual specially injured, and exemplary damages recovered. In *Rex v. Ogden and others*, 10 Barn. & Cres. 230, Bayley, J. says, "There is no instance of a quo warranto information having been granted by leave of the court, against persons assuming a franchise of a mere private nature, not connected with the public government." This proposition seems to be sustained by the cases of *Rea v. Thatcher*, 1 Dowl. & Ry. 426, and *Rea v. Justices of Herefordshire*, 1 Chit. 709; see also *The People v. Hillsdale and Chatham Turnpike Company*, 2 Johns. R. 190; and goes beyond what is deemed necessary to contend for on the part of the defendants.

The counsel next insisted that *the people* having exacted and received a *bond with surety* for the building and keeping in repair of the bridge, should look to that remedy and not ask for a *forfeiture* of the franchise. A forfeiture for misuser is not prescribed in the statute creating the franchise; if it exists, it arises by implication of law. The doctrine on the other side is that all franchises are granted on the *implied condition* that they shall be duly executed ac-

The People v. Thompson.

ording to the grant, and on failure to perform, the franchise shall be forfeited; but the law will not raise such implication where the penalty is provided for by express stipulation. It is a settled rule, that "an express covenant will do away the effect of all implied covenants." 2 Caines, 192; 11 Johns. R. 122. In support of this proposition, the counsel cited the case of the *Commonwealth v. Breed*, 4 Pick. 460, which was an information in the nature of a *quo warranto*, requiring the defendant to show by what title he claimed a certain bridge. The statute which authorized him to build the bridge, required that he should construct a *draw* for the passage of vessels, and on the approach of vessels, remove the same at his own expense; and in case of any undue detention, he should forfeit a sum not less than *three dollars*. The jury found specially, and from their finding, it would seem that the removal of the draw had not in general been well attended to. The court in giving their opinion say, "The penalty for any unnecessary delay in raising the draw, is fixed by the statute; and any neglect of this kind would subject the owner to this penalty, but would not operate as a forfeiture of the franchise."

The counsel next insisted that under the act of 24th March, 1795, John B. Coles was justified in *reducing the opening between the centre arches, to a width less than twenty-five feet*. This act authorized the *width of the bridge* to be reduced to 24 feet, and the *opening for the passage of boats* to be reduced to *eight feet*. If it be objected that this reduction was allowed only on the condition that a *stone dam* was erected, it is answered, that when this case was before this court on *demurrer*, it was held by the judges, that the leave to *reduce the width of the bridge* was unconditional; that the provision relative to the stone dam and lock was a *privilege* given to Coles, and not a *duty* imposed upon him, and that it was optional with him to avail himself of that privilege or not, as his interest might dictate. The reasoning of the court on that occasion overrules the objection now made on the other side. If Coles had an unqualified leave to reduce the *width of the bridge*, he had also an unqualified leave to reduce the opening for the

The People v. Thompson.

passage of boats. Unless therefore the verdict finds not only, that there is a diminution, but that the extent of the diminution is such as to reduce the opening to *less than eight feet*, there is no foundation laid for a forfeiture.

The counsel next insisted that the verdict would not authorize judgment of ouster on the ground of the *defective finding of the jury*. The verdict, he said, does not state the *cause* of the diminution of the opening between the centre arches of the bridge, nor the *extent* of such diminution, nor whether *any injury* thereupon has resulted or is likely to result to the public, nor that the obstruction formed any part or parcel of the bridge. For aught that appears, the diminution may have been caused by the act of a stranger, or by the current of the river, or by an earthquake, and its extent may have been a foot, an inch, or the breadth of a hair. The counsel admitted the correctness of the rule as laid down in 4 Cowen, 118, in a note, that "Where several things are necessary to constitute a complete title in the defendant, the attorney general may take issue on each, and if *any one of the issues, on a fact material to the title*, be found against the defendant, there shall be judgment of ouster; but insisted that the issue found against the defendants here was *not on a fact material to their title*. Had the force of the tide or any other cause lessened the *width of the opening* in question to the extent of the smallest mathematical line, there would have been a *diminution* in the opening, and the jury under the pleadings in the case, which went far beyond what the case required, were bound to say so; but their finding in that respect is *immaterial*, and on an *immaterial finding*, the court will not pronounce judgment of ouster. The jury find a *diminution*, but do not say it is *material* to the issue, and the court are asked to supply the omission by *inference*. Now no rule of law is more inflexible than that in giving judgment on a *special verdict*, (and the attorney general in his opening argument avers this to be such;) *the court can draw no inferences*; they cannot intend a fact not expressly found by the verdict. The rule is especially applicable to *penal actions*, and this is emphatically a penal action, seeking as it does the forfeiture of a bridge,

The People v. Thompson.

worth probably \$60,000. In a case of this kind all the intendments of the law are in favor of the defendants. It will intend, where the contrary does not appear, that the temporary obstruction, narrowing the opening between the centre arches of the bridge, was owing, not to the unlawful act of the defendants, but to some cause over which they had no control; that the diminution was of a slight and trivial nature, and not of so aggravated and heinous a character as to work a forfeiture; that the obstruction has been innoxious in its effects, and has not wrought injury or inconvenience to the public; that the obstruction did not form a part and parcel of the bridge, but that it was something adventitious, collateral and extraneous, and the intendment of the court in favor of the defendants will be strengthened by the consideration, that the obstruction, such as it was, remained for ten long years without eliciting any complaint. The counsel for the people put forth the proposition, that any reduction of the opening to less than twenty-five feet, *however trivial such reduction might be*, works a forfeiture of the franchise. The verdict finds a diminution, but not the extent thereof; it does not find a foot, an inch, or any degree of diminution beyond the most attenuated line that the imagination can portray, and the law can find nothing beyond it in the verdict. Can it be that this evanescent shade of diminution, in a thing collateral to the main subject, has wrought a forfeiture of the bridge? The argument of the counsel is founded on the assumed rule that every franchise is held *upon condition*, and in case of neglect by the grantees to perform the condition, the franchise may be repealed. This is a rule of the common law, and if it applies to the statutes under which the franchise here is held, it is by virtue of the force of the common law, as those statutes are wholly silent as to any forfeiture incident to the breach of any condition. It is therefore a condition *implied* by the common law. Now whenever the common law implies a condition, and especially where it attaches the penalty of forfeiture to the breach, it exacts only a substantial and reasonable performance. The common law is the fruitful mother of a large family of implied conditions, and she

The People v. Thompson.

deals towards them with a mother's hand and a mother's heart. She does not put on her magnifying glasses to detect some fractional, minute, and scarcely perceptible infringement of the latter ; she imposes the penalty of forfeiture only where there has been a blameable, palpable and substantial violation of the spirit of the condition.

The *Attorney General*, in reply, remarked, that two of the principal grounds relied on in the argument on the other side, appear to have been suggested to the minds of counsel since the decision of the demurrers and the trial of the issues of fact in this cause. If a *quo warranto* would not lie in a case of this kind, and if recourse to the *bond with surety* given by John B. Coles was the *only remedy* existing for a *misuser* of the franchise, it is passing strange that those grounds of defence should not have been urged originally, instead of putting in voluminous pleas, to show a strict conformity with the terms of the act by which the franchise was granted, if the counsel had any confidence in them ; and it was equally strange that the discovery, that an opening of *only eight feet* between the centre arches of the bridge is all that can be required, should not have been made until now. But to proceed to the reply ; the counsel calls this a *private franchise*. It is not a private franchise. When a franchise confers only *individual privileges*, then it is *private* ; but when it affects *public rights*, it is a *public franchise*. In cases of private privileges in the nature of a franchise, the *government* alone can interfere ; but where public rights are trenched upon by a franchise, every citizen has an interest, and may become a *relator*, in the name of the people, on leave obtained from the court. That a *quo warranto* will not lie in the latter case, is not and cannot be argued with any show of reason ; for if a *quo warranto* does not lie in such cases, then every franchise, though by the terms of the grant *conditional*, is in fact *unconditional*, although the holders of the franchise are guilty of the most palpable acts of misuser—there being no other mode of proceeding than by *quo warranto*, by which the persons holding the franchise can be tried. This remedy is part of the common law of the state, and was not originated by

The People v. Thompson.

statute ; all the statutes treat it as an existing remedy, and only profess to regulate the practice in respect to it.

The process of *quo warranto* is a useful, necessary and indispensable process ; nor is there any thing alarming in it. A mere accidental or trifling departure from the terms of the grant, if remedied as soon as discovered, does not create a forfeiture, and if properly pleaded, the law would so pronounce it ; but how does that apply to a continued violation, as in this case, of ten years. Nor is there any force in the argument that the only remedy for a misuser was to prosecute the *bond* given by Mr. Coles. The bond is conditioned as well for the *erection* of the bridge as for the keeping of it *in repair* after its erection ; and if the grounds assumed by the counsel for the defendants be correct, a *quo warranto* could not have been brought for *nonuser* had the bridge never been erected, or been erected in a manner entirely different from the requirements of the act. The permission to erect a *lock of the width of only eight feet*, given by the act of 1795, cannot help the defendant. That permission was given in case Mr. Coles erected a *stone dam* ; such dam was never erected, and consequently the lock fell with it. The legislature may have supposed that the dam would have rendered the navigation of the river a still water navigation, which would have made an opening of twenty-four feet unnecessary, and therefore authorized a lock of only eight feet ; but whatever may have been the views of the legislature, the dam not having been built, there was no pretence for reducing the *opening* to any number of feet less than twenty-four. As to the *sufficiency* of the verdict to enable the court to pronounce judgment, the counsel referred to his opening argument.

By the Court, NELSON, Ch. J. That the remedy here sought for the grievance complained of is the appropriate one, cannot be doubted in this court, after the cases already decided. 15 Johns. R. 358. 6 Cowen, 126, 211, 217. 5 Wendell, 211. 15 id. 113.

This is not a *private franchise*, coming within the reason of the rule which has influenced the English courts not to

The People v. Thomson.

interfere with it by writ of *quo warranto*, on the relation of a private party, 2 Ld. Raym. 1409; Strange, 637, S. C. : Cas. Temp. Hardw. 247; 15 Johns. R. 389; 4 Cowen, 104, note, and cases there cited; Willcock on Corp. 457, 459; but one of a *public nature*, in which the community at large are essentially interested. Our statute is broader than the statute of Ann, both as to the *officers* and *franchises*, in respect to which the remedy may be thus applied, 2 R. S. 582, § 28; 1 R. L. of 1813, p. 108, § 4; 9 Ann, ch. 20, § 4; and the writ has often been allowed in England in analogous cases, on the application of the crown officer or attorney general. *Rex v. Nichols and others*, 1 Strange, 299. *Rex v. Badcock and others*, 6 East, 359. *Rex v. Clarke*, 1 id. 43. And see Willcock on Corp. 454, 457. The cases in this court, above referred to, will also show that the remedy is equally as appropriate where the franchise has become forfeited by *nonuser* or *misuser*, as in the case of an original *usurpation*.

The above view may be considered an answer also to the second ground taken against judgment of ouster; namely, that a *private franchise* cannot be forfeited by this process, where the people have required a *bond* with surety, conditioned, that the subject of the grant be made, and maintained according to its terms; for I do not understand the learned counsel to put forth the position as tenable where the franchise is deemed a *public* one. Be this, however, as it may, I am satisfied it is not maintainable in either case. The bond is but a *cumulative security* to the public, that the conditions of the statute will be faithfully observed. There is nothing in its enactments negating this well defined and clearly understood common law remedy, and as has been well remarked by the attorney general, if the position of the counsel be sound in respect to the claim of forfeiture for *misuser*, it must be equally so as to that arising from *non-user*, the condition of personal security comprehending each. The consequence would be, that the exclusive privilege of erecting a bridge over the Harlaem river to Morrisania, whether the bridge be erected or not, might continue vested in Morris and his assigns for the sixty years, on their

The People v. Thompson.

submitting to a forfeiture of the penalty of the bond. It would require a very clear and distinct provision in the statute to justify the conclusion that such was the intent of the legislature. It should be remarked also, that the course of pleading by the defendants has in effect conceded to the people the ground now sought to be occupied by the counsel in both the points above noticed.

Equally unavailing is the attempt to prevent judgment of ouster, on the ground of authority, to reduce the *opening between the centre arches* to a width less than twenty-five feet under the act of 1795. Though the *width of the bridge* was reduced by that act from thirty to not less than twenty-four feet, its dimensions in every other respect are left as prescribed in the original grant by the act of 1790. If the stone foundation had been built according to the former statute, the lockage through need have been only eight feet in width ; but then, very particular provision was made to facilitate the passage of boats without unnecessary delay, and suitable penalties were prescribed in case of neglect. Neither Coles or his assignees, however, have availed themselves of the privileges of the act of 1795. The foundation, dam and lock have never been constructed. The defendants, therefore, can set up no rights under it. For this reason they have been forced to fall back upon the act of 1790, as their defence against the charge of usurpation ; and to maintain themselves, they must show, at least, a *substantial compliance* with its conditions. They cannot modify it by a statute, the provisions and privileges of which have long since been forfeited.

The only remaining position, and it may be said the only one in the case but what had been already virtually disposed of by the pleadings themselves, arises upon the form and effect of the verdict. It finds the bridge to have been originally built in conformity to the requisition of the statute ; but that since 1825, and until the commencement of this proceeding, there has not been an opening between the centre arches of the width of *twenty-five feet*, as alleged in the plea, and that during all this time the opening has been of less width than twenty-five feet. The grounds taken by the counsel for

The People v. Thompson.

the defendants, in respect to the verdict are, that for aught appearing to the contrary upon the face of the verdict, the variation from the statutory regulations may have been trifling ; it may have been occasioned by obstructions wholly disconnected with the construction of the bridge, or by third persons ; and that the verdict does not show that the public have by means thereof sustained, or are likely to sustain, any inconvenience. There are, I think, without regarding separately the grounds thus assumed, two conclusive answers to them : 1. The defendants held the affirmative, and were bound to maintain their plea of *title* generally to the franchise, either by the concession of the attorney general, by proof, or in some other way ; they must, therefore, necessarily show the width between the arches to be according to the requisition of the statute, or set up a *legal excuse* for any departure therefrom. If compelled to admit a substantial departure, they should have put the justification upon the record, and brought it before the court ; and in that way obtained their judgment directly upon it. After having put themselves upon the ground of exact and literal conformity, upon which issue has been taken, a most material one, and which issue is found against them, with what propriety can they come in and say, true we have not performed the condition of our grant as found by the jury, but, perhaps, we had a legal excuse for the neglect or omission ? Thus, litigating the charge of exercising the franchise without warrant upon one ground, and after having failed, calling upon the court to justify them upon another and distinct one, and that, too, founded altogether upon presumption.

But 2. Assuming *an excuse* for the diminution of the opening to be available under the pleadings, it being involved in the issue, and the subject of litigation on the trial, the verdict for the people, under the charge and direction of the court, necessarily negatives the existence of any excuse. No objection is taken to the ruling of the judge in respect to the evidence offered, or to his instructions to the jury ; we must assume, therefore, that the defendants have had the full benefit of any explanations or excuse in their

 King v. Dunn.

power to offer, within the issue, and had it been such as would have made out a justification in judgment of law, that the verdict would have been in their favor. If the judge excluded competent evidence in relation to the excuse, or misdirected the jury upon the point, or if the verdict be against the weight of the evidence, the defendants should have sought a correction in the usual way, by a *case* or *bill of exceptions*.

This is not a special verdict in the technical sense of the term, but a direct finding of the issue for the people. A special verdict presents a statement of the facts proved, referring the conclusion of law to the court, and concluding conditionally for the plaintiff or defendant, as the court may be of opinion upon the whole matter.

Without pursuing the inquiry further, I am of opinion that the plaintiffs are entitled to judgment of ouster. 2 R. S. 583, § 48.

 KING vs. DUNN.

In *trespass quare clausum fregit*, where the plaintiff declares setting out the close with abutments, it is not necessary that he should, on the trial, show title to every part of it; it is enough if he show title to that part of the close in which the trespass was committed.

Where a plaintiff in error dies pending a writ of error, judgment of affirmance or reversal will be directed to be entered as of a term when he was alive, *nunc pro tunc*.

ERROR from the Washington C. P. *King* sued *Dunn* in the court below for breaking and entering his close, situate in the town of *Argyle*, and cutting and carrying away trees. The declaration contained two counts. The first count set out the boundaries of the close as follows: "bounded on the *west* by lands owned or possessed by *James Shannon*, on the *south* by lands, &c."—giving the name of the owner or occupant on each of the four sides. The second count was general, giving no boundary. The defendant pleaded first, not guilty to the whole declaration, and then a special plea of *liberum tenementum* to each

King v. Dunn.

count; to which the plaintiff replied, taking issue. On the trial it appeared that the plaintiff and defendant severally owned lands in the town of *Argyle*. The close described in the first count contained 150 acres of land, of which the plaintiff owned all but a piece containing 25 acres in the *north-west* corner thereof, which belonged to *Ransom Stiles*. The trespass was committed on the *plaintiff's land* near the *north-east* corner of the close described in the declaration. The defendant moved for a nonsuit, insisting that the plaintiff could not recover under either count; not under the second, because the defendant had proved that he owned land in the town of *Argyle*; and not under the first count, because it *misdescribed* the close. The court decided that the plaintiff could not recover under either count. The plaintiff then asked leave to amend the first count by describing the close as bounded on the *north-west* by the land of *Stiles*. The court decided that it had no power to grant, the amendment, and nonsuited the plaintiff. He excepted, and now brings error.

S. Stevens, for the plaintiff in error.

Allen & Blair, for the defendant in error.

By the Court, BRONSON, J. The defendant maintained his plea of *liberum tenementum* to the second count, by proving that he had lands in the town of *Argyle*, where the trespass was alleged to have been committed. If the plaintiff wished to avoid this consequence, he should either have described the close in the count, or have new assigned setting out the abutments.

But the plaintiff was, I think, entitled to a verdict on the first count, notwithstanding the fact that a small part of the close described in the count was not owned by him, but by a stranger. The court below erred in treating this as a question of variance. There was just such a close or parcel of land as the declaration described; and the true question on the pleadings was, whether the plaintiff was bound to prove title to *every part* of the close. It was

Eddy v. Stanton.

enough that he showed title to that part of the close in which the trespass was committed. And so too of the defendant, although he pleaded that the whole close was his soil and freehold, he would have been entitled to a verdict on showing that he owned the part where the trespass was committed. *Stevens v. Whistler*, 11 East, 51. *Topley v. Wainright*, 5 Barn. & Ald. 395. *Rich v. Rich*, 16 Wendell, 663.

As the plaintiff has died pending the writ of error, the judgment of reversal may be entered *nunc pro tunc* as of January term, 1836, when the plaintiff was alive.

Judgment reversed.

EDDY & AMES vs. STANTONS.

Where a note against a third person is sold and transferred, and the transferor engages to *repay* the sum paid for the note by the transferee, in case the same cannot be collected of the maker *by due course of law*, it is no excuse for a neglect to attempt the collection, that the maker of the note was *insolvent*, where by the terms of the agreement the transferor is bound to pay the costs of any attempt to collect.

Nor is it *any excuse* for not attempting the collection, that *thirty-one months* after the transfer, the transferor gave notice to the transferee that he would not be liable for costs which might he incurred in any attempt to collect the note, it being past maturity at the time of the transfer; the transferee in such case being chargeable with *laches*.

Even a *release* to prosecute given at so late a day, will not help the transferee.

A plea, to a count for money had and received laying the indebtedness at \$800, that the money thus alleged to be received was paid by the plaintiff to the defendant as the consideration of a note of \$512 39, transferred by the latter to the former, is not a good answer to the count where no *fraud* is alleged, where the transaction is not alleged to have been *usurious*, and where, by the terms of the contract, the defendants assumed the hazard of the expense of collection.

Where there are issues of law and of fact, and the plaintiff proceeds to the trial of the issues of fact before disposing of the issues of law, and the issues of fact are found against him, and the issues of law are also subsequently decided against him, *leave to amend* will not be granted to him.

DEMURRER to declaration, &c. The plaintiffs declared in assumpsit, than on 22d July, 1833, the defendants for the

Eddy v. Stanton.

consideration of \$587 60 paid to them, sold and transferred to the plaintiffs a note made by one *Daniel Simmons*, dated 15th December, 1832, for 582 39, payable six months after date to the order of the defendants; and that the defendants agreed in case the plaintiffs could not *set-off* the note in payment of any balance that might be due from them to *Simmons* on settlement of their accounts with him, or collect the same in *some other way* or *due course of law*, that they would repay to the plaintiffs the said sum of \$587 60, and the interest thereof from 22d July, 1833, and also all costs which the plaintiffs should pay or be liable to pay by reason of any prosecution of the note, or attempt to set-off the same. The plaintiffs then aver, that on 1st September, 1833, and at divers times since, they attempted and made all the efforts in their power to set-off the note in the payment of a balance due to *Simmons*, and to collect the same in some other way, but were unable so to do; and thus failing to set off or collect the note, they were desirous to prosecute *Simmons*, and to collect the same by due course of law, and would have done so, but that at the time of the transfer of the note to them, at all times thereafter, and at the time of declaring, *Simmons* was *insolvent*, and entirely unable to pay the note or any part thereof, whereof the defendants had notice. By means whereof the defendants became liable to pay, &c.; and being liable promised to pay, &c. The *second* count is similar to the first, except that it contains an additional averment that on the 18th February, 1836, the defendants *released* and discharged the plaintiffs from the obligation, if any they were under, to prosecute *Simmons* upon the note, to collect the same *by due course of law*, and that the defendants then and there refused to pay or become liable to pay, any expenses upon any suit which the plaintiffs should prosecute against *Simmons* upon the note transferred to them. By means, &c., the defendants became liable, &c. The declaration also contained a *third* count for money lent, *money had and received*, &c., laying the indebtedness at \$800.

The defendants *demurred* to the *first* and *second* counts, and to the *third* count pleaded: 1. *Non-assumpsit*; 2. That

 Eddy v. Stanton.

the plaintiffs ought not to have or maintain their action, because the money in the third count mentioned was paid to the defendants by the plaintiffs for a note of \$582 39, setting forth the note described in the first count of the declaration, wherefore they pray judgment, &c. ; and, 3. They put in a plea like the *second*, except that the terms upon which the note was transferred are set forth, and it is then averred that on 1st January, 1836, the plaintiffs did set-off the note against a demand which Simmons had against them, concluding with a verification, and prayer of judgment.

To the *second* plea, the plaintiffs replied, admitting that they paid a large sum of money for the note of Simmons, here stated at \$587 60, and then, after setting forth the terms of the transfer of the note as already repeatedly stated, aver that on 1st January, 1836, they attempted to effect a settlement of accounts with Simmons, but were unable to do so ; that at the time of the transfer of the note to them Simmons was insolvent, and had so remained ever since ; that on 18th February, 1836, the defendants gave notice to the plaintiffs that they would not pay any expense of any suit against Simmons, or any costs which should be made in attempting to collect the note, and required the plaintiffs to abstain from the commencement of any suit or proceeding for the collection of the note, and this, &c. wherefore, &c. To the *third* plea there was a similar replication. The defendants demurred to the replications.

S. Stevens, for the defendants.

J. Holmes, for the plaintiffs.

By the Court, COWEN, J. 'The special counts in the declaration and the replications all set up substantially the same ground of action. The defendants cannot be made liable till the three conditions precedent are shown to be fulfilled or executed. *Taylor v. Otis & Bullen*, 6 Cowen, 624. *Cumpston v. McNair*, 1 Wendell, 457. If the plaintiffs could collect the note by *setting it off* against what they

 Eddy v. Stanton.

owed Simmons, or by *voluntary payment* by him, or by *due course of law*, they have no claim. It was incumbent on them to use due diligence in the pursuit of all these methods before they could resort to the defendants. On Simmons refusing to pay or set off, he was compellable *by suit*, which the plaintiffs were bound to show they had brought in due season, and failed without any fault of their own. *Moakley v. Riggs*, 19 Johns. R. 69. *Kies v. Tift*, 1 Cowen, 98. *Thomas v. Woods*, 4 id. 173. This they should have shown, with times and other particulars, such as the law would recognize as due diligence. In that they have altogether failed.

No adequate excuse for the failure is shown. The *insolvency* of Simmons was no excuse, *Moakley v. Riggs*, 19 Johns. R. 71, 2, especially in a case like this, of set-off, and wherein the defendants had agreed to bear the expense. *Thomas v. Woods*, 4 Cowen, 173. *Taylor v. Bullen*, 6 id. 624. The case of *Morris v. Wadsworth*, 11 Wendell, 100, does not apply; the defendants could not escape the stipulated expense by the refusal to pay it, according to the agreement; nor would such a refusal and a prohibition to prosecute, work a rescission of the contract, and this especially so late as 1836.

The releasing of the plaintiffs from all obligation to prosecute was a *non sequitur*. It did not *per se* make the defendants liable, even admitting that it had been the day after the note was sold. It might well dispense with one of the conditions in such case, viz. a prosecution by the plaintiffs; but they might still have had ample means of set-off by way of defence against a suit by summons. The want of such means without their own fault is not shown. It is merely said they were unable to set off; but *that* might have been by their own fault. It is sufficient, however, to say that the conditions were all gone by *laches*, for aught that appears, before the release was given. Indeed, taking the dates given by the plaintiffs, *laches* appear affirmatively on their own showing.

The plaintiffs' counsel, however, insists that the pleas are bad in substance. They are undoubtedly so in *form*, as

Eddy v. Stanton.

amounting to the general issue ; but that is an objection which should have been raised by special demurrer. It is supposed that the balance of the \$800, beyond the face of the note, appears by the second plea to be recoverable under the money counts as money had and received, inasmuch as it was unconscientious to receive \$800 for \$587 60. That we cannot infer. The note might have been a very valuable purchase to the plaintiffs, and worth much more than its face. They are averred voluntarily to have agreed to pay that sum, and nothing unconscientious appears or is to be implied. If there was any such thing, it should have been shown by the replication. Neither ignorance nor mistake nor fraud is to be implied. The payment of such a balance would come nearest to *usury*, and for an excess usuriously paid, an action for money had and received would lie ; but here is no loan, no forbearance shown ; and if a man will give \$800 for \$500, voluntarily, there is no principle on which it can be recovered back. It is valid as a gift. It may be added, that the defendants here undertook for expenses which might have been very considerable, and might call perhaps eventually, for a payment of more than the face of the note.

It is insisted that the third plea is bad, because it answers as to only part of the \$800 of the third count. It alleges that the plaintiffs paid the \$800 as in the second plea, but adds that in consideration of \$587 60 paid for the note, the defendants agreed as in that plea set forth. There may not be enough in the additional matter to cover the whole \$800 in the third count ; but, for aught I see, the previous matter is as full as the second plea. Rejecting the special addition, as I think we may, the plea is then valid in substance ; and however it may fail in form, there is no special demurrer to reach the defect.

There must be judgment for the defendants on all the demurrers, without leave to the plaintiffs to amend ; the cause having been tried on a plea of non-assumpsit, and a verdict rendered for the defendants. *Hallett v. Holmes*, 18 Johns. R. 28, 30. *Cleveland v. Rogers*, 6 Wendell, 438.

Judgment accordingly:

Wakeman v. Newton.

WAKEMAN vs. NEWTON & CRAWFORD.

In an action on a bond given to relieve from arrest a ship or vessel proceeded against under the statute, the plaintiff is bound not only to state his demand in his declaration, but to prove it on the trial of the cause, notwithstanding that the defendant pleads no other pleas than *non est factum* and *general performance*; it is not enough that he establish his claim before the commissioner granting the process.

A plea of *performance*, whether *general* or *special*, of the obligations specified in the condition of the bond, is an inappropriate plea in an action on such bond, and it seems would be the subject of demurrer; when, however, the plaintiff takes issue upon a plea of *general performance* by replying generally, denying the performance, the plea will be regarded as setting up a *special performance*, and the defendant will be allowed to give any evidence tending to show that the plaintiff is not entitled to recover.

PROCEEDINGS against ships and vessels. A vessel called *The Tompkins* of Tioga, had been seized under a warrant issued upon the application of the plaintiff by a supreme court commissioner, by virtue of the act authorizing *proceedings for the collection of demands against ships and vessels*, 2 R. S. 492. *Newton*, one of the defendants—applied to the commissioner for the discharge of the warrant, and accordingly, with *Crawford* as his surety, entered into a bond to the plaintiff in the penal sum of \$200, conditioned that he would well and truly pay the amount of all such claims and demands as should have been exhibited before the commissioner, which should be established to have been subsisting liens upon the vessel; pursuant to the provisions of the act entitled, &c. Upon this bond, a suit was commenced, and the plaintiff in his declaration, after setting forth the bond and the condition thereof, averred that previous to the execution of the bond, he was the owner of a wharf at Caldwell's Landing, in the county of Rockland, that the *Tompkins* was brought to his wharf, and occupied it from first May, 1835 to 13th October, 1836, and that for such *wharfage* and for his services in taking charge of the vessel, he was reasonably entitled to \$93, which he averred to be the same claim exhibited by him to the commissioner on his application for the warrant, and was a subsisting lien.

Wakeman v. Newton.

That the vessel was removed from his wharf without his knowledge leaving his demand unpaid, and that he thereupon applied to the commissioner for the warrant pursuant to the statute, setting forth all the subsequent proceedings down to the execution of the bond and the discharge of the warrant by the commissioner. He then averred that the bond was delivered to him to be prosecuted, and by way of breach alleged that the defendants had not paid his said demand, which he alleged was a subsisting lien, whereby an action had accrued to him to demand and have, &c. concluding in the usual form. The defendants pleaded, 1. *Non est factum*; and 2. *General performance* by keeping, fulfilling and performing all and singular the clauses and agreements in the condition of the said writing obligatory specified. To which second plea the plaintiff put in a replication *denying performance*; and upon the issues thus joined the parties went to trial.

The cause was tried at the Orange circuit in April, 1838, before the Hon. CHARLES H. RUGGLES, one of the circuit judges. The counsel for the plaintiff read the bond in evidence and rested. The counsel for the defendant moved for a *nonsuit*, insisting that it was incumbent upon the plaintiff to prove his demand and the amount to which he was entitled; which motion was overruled. The counsel for the defendant then insisted that as the case then stood, the plaintiff was entitled to recover only *nominal damages*. The judge ruled that the defendants' pleas *admitted* the plaintiff's damages to the amount claimed in the declaration. The defendants' counsel offered to prove that the defendant Newton had paid all claims which were exhibited to the commissioner, and were subsisting liens upon the vessel at the time of such exhibition; but the judge ruled that under the state of the pleadings, the defendants could only prove *payment* in whole or in part of such claims as were mentioned in the declaration. The defendants then proved the payment of \$30, to the plaintiff, in full of all charges on the vessel, until the spring of 1836, and offered to prove that the amount thus paid was as much as the plaintiff deserved for the wharfage, and for the services bestowed by him;

Wakeman v. Newton.

but the judge refused to receive the evidence, and the jury, under his charge, found a verdict for the plaintiff, for \$69 61. The defendant moves for a new trial.

G. C. Goddard, for the defendants.

C. Storms, for the plaintiff.

By the Court, NELSON, Ch. J. The legal effect of the condition of the bond can be understood only by a reference to some of the sections of the statute under which it is given. The statute, 2 R. S. 493, § 1, sub. 3, makes every debt amounting to \$50, or upwards, contracted by the master, owner or agent of any ship or vessel within the state, on account of *wharfage*, and the expense of keeping her in port, including the expense incurred in employing persons to watch her, a *lien* upon the ship or vessel, her tackle, &c. Provision is then made for seizing her under an attachment, and also for discharging her from the same by giving the bond. By § 16, the attaching creditor in a suit upon the bond shall state in the declaration his demand, alleging the work done, or expenses incurred, as the case may be, at the request of the master, &c., averring that the claim therefore was a subsisting lien on such vessel, at the time of the exhibition thereof before the officer, and shall assign as a breach of the condition of the bond, the non-payment of the claim: to which declaration and to such assignment of breaches by § 17, the defendant may plead as in other actions of debt on bond. From these provisions the legal effect of the condition appears obvious enough—it is that the obligors shall pay all such claims and demands as have been exhibited before the officer issuing the attachment, and which shall be proved to be subsisting liens upon the vessel within the meaning of the statute. The condition contemplates a suit on the bond, and the establishment of the *lien by evidence at the trial*. The counsel for the plaintiff seems to suppose it enough, to establish the lien before the officer, but this is clearly a mistake: the object of allowing the bond is to enable the defendant to litigate the claim.

 Wakeman v. Newton.

The plea of *general performance* must, I think, be considered inappropriate, as a full compliance with the condition is impossible, till the amount of the *lien* is fixed by the verdict or judgment; and, for the same reason, I do not perceive how a *special performance* can consistently be pleaded. The plaintiff, however, instead of demurring, has replied in as general terms as the plea, taking issue; and the question is, as to the effect of this issue in respect to the proof necessary, or admissible, to maintain or defend it. Pleading a general performance, where a special one is the appropriate plea, is but matter of form, and the objection available only on special demurrer. Cro. Eliz. 233. 5 Bacon, 464. So where this plea of general performance is put in, the plaintiff, instead of replying generally as is done here, should specify a particular breach, or breaches. 1 Saund. 117, n. 1. 2 id. 410, n. 3. 2 id. 462, n. 1 Chitty's Pl. 556, 515. Now, if we are to regard this plea as equivalent to a plea of special performance, which we must according to the cases and as answering fully the condition of the bond, then as the replication does nothing more than negative the performance, I do not perceive why the defendants should not be permitted to introduce any evidence that might tend to establish it; they may controvert the existence, or amount of the lien—or show payment of whatever sum is proved—as each view tends directly to sustain the plea, or in other words, a keeping of their covenant. The counsel for the plaintiff and the judge at the circuit, have gone upon the idea that the plea set up a performance of the several matters contained in the declaration, and tried the issue upon that view of the case; but this is not the language nor legal effect of it, nor is it the meaning or effect of pleas of performance, generally, 2 Chitty's Pl. 282, n. 3. The plea is generally in the words of the condition of the bond. Id; 2. Saund. 404; *Lord Arlington v. Merricke*, 410, n. 3. The defendants are bound to fulfil their covenant. The plaintiff sets out what he considers a breach and claims a debt or damages; the defendants answer that they have kept their covenant, and regularly the plaintiff should in such case reply a specific breach or

Newland v. Baker.

breaches, which would bring the pleadings to distinct points, 1 Chitty's Pl. 515, 556, 620; but here he has replied taking issue generally upon performance, thereby leaving his declaration, and putting the issue upon performance or not. The defendants held the affirmative, and it appears to me quite clear that any evidence tending to prove it, must be admissible.

The case, as it stands upon these irregular pleadings, is not unlike the issue formed by a plea of *non infregit conventionem*: which denies the breaches and puts in issue all such matters as show that the covenant is not broken, or that the defendant was never, under an obligation to fulfil the one declared on, 7 Cow, 71; or like the case of a general replication to a plea of *non damnificatus*, which would be no more irregular than the one in this case, and where any evidence tending to disprove loss or damage by the plaintiff would be pertinent.

There must be a new trial; costs to abide event.

NEWLAND vs. BAKER & STAATS.

An action does not lie against a *constable* for not paying over money collected by him on execution, where he has been sued and a recovery had against him for selling property, by the sale of which the money collected by him was made, where such recovery is equal to or exceeds the amount of the execution.

And such action does not lie, although the plaintiff in the execution on the delivery of the process executed a *bond of indemnity* to the constable, and notwithstanding, that the constable has brought an action upon such bond.

DEMURRER to replication. The plaintiff declared in *covenant* on an *obligation* executed by *Baker*, for the faithful performance of his duties as one of the *constables* of the city of Albany; *Staats*, the other defendant, signed the obligation as the surety of Baker. The plaintiff alleged that on the 14th September, 1836, he delivered to Baker an execution issued from a justice's court in his favor against one *William Wright*, for \$50 64 damages and costs, to be duly

Newland v. Baker.

executed. The execution was returnable in 90 days, and before the return day, Baker collected the money, but neglected to bring it into court. The defendants *pleaded* that the money collected by Baker, was made by the sale of certain property, for the selling of which an action of *trover* was brought against him by one *Margaret Gaylor*, on the 16th September, 1836, in which action Mrs. Gaylor subsequently in May term, 1837, recovered a judgment for \$156 53 damages and costs; that on the trial of such cause the present plaintiff appeared and defended, that the question litigated was, whether the property belonged to *Wright* or to *Mrs. Gaylor*, and that the jury found in favor of Mrs. Gaylor. In addition to which the defendants averred that the property did in fact belong to Mrs. Gaylor. To this plea the plaintiff replied, that on delivery of the execution against Wright to Baker, he with a sufficient surety, executed a *bond of indemnity* to Baker, to save him harmless, &c., and that thereupon, Baker sold the property and made the amount of the execution. The plaintiff further averred that after the judgment against Baker, in favor of Mrs. Gaylor, to wit, in July term, 1837, Baker commenced a suit upon the *bond of indemnity*, which is still pending. This suit was commenced in July term, 1838. The defendants demurred to the replication.

J. C. Yates, for the defendants.

O. A. Kingsley, for the plaintiff.

By the Court, BRONSON, J. The plea gives a sufficient answer to the action. The plaintiff complains that *Baker* as constable collected and received the amount of the execution against *Wright*, and that he wrongfully withholds the money. The answer is, that although the constable took and sold certain property as the property of *Wright*, and thus collected the amount of the execution, yet a third person, to whom the property belonged, has sued the constable for taking it, and recovered a sum exceeding the amount which had been levied. The constable has got no money in his hands

Newland v. Baker.

belonging to the plaintiff. Although in form the execution and the judgment were satisfied by the sale, yet, in legal effect, there has been no satisfaction; the judgment against Wright is still in full force, and the plaintiff has a remedy in that direction. It would work great injustice to allow the plaintiff to maintain this action, when, in effect, the constable has received nothing.

If the recovery against the constable was by collusion between him and Mrs. Gaylor, as is hinted in the brief of the plaintiff's counsel, that matter should have been set up by way of replication. The plea shows an adverse recovery, against the united effort of Baker and the plaintiff Newland. And besides, it is averred that the property did in fact belong to Mrs. Gaylor.

The replication is, that before the levy, there was an agreement to indemnify the constable. If the plaintiff should succeed upon this ground, the constable might immediately turn round and recover back the money in an action on the plaintiff's covenant to indemnify. This circuitry of action ought, if possible, to be avoided. *Clark v. Bush*, 3 Cowen, 151. *Smith v. Mapleback*, 1 T. R. 441, per Buller, J. But it is unnecessary to rest the decision upon that ground. The replication does not go far enough. It only shows that the constable will have a remedy over if the plaintiff succeeds. It does not overturn the plea, which shows that the constable has not got the money, and is not in default. If the plaintiff had paid Mrs. Gaylor's judgment, had performed his contract to indemnify the officer, this action might perhaps have been maintained.

The fact that an action has been brought against the plaintiff on the covenant of indemnity, cannot affect this question. In that action the question will be, how much has the constable been damnified? If he has paid Mrs. Gaylor's judgment and other expenses, he cannot recover the whole amount, but only such balance as may remain after deducting the money levied on the execution. Although that money cannot be recovered in this action, it will go to the question of damages in the suit upon the plaintiff's covenant.

Judgment for defendants.

Hinman v. Booth.

HINMAN and others vs. BOOTH.

Where a deed is delivered as an *escrow*, to become absolute on the execution of a bond by the grantee for the maintenance and support of a third person during life, nothing can be claimed under it if the bond has never been executed, although such third person has died, and the grantee during his life provided him the necessary support.

Where a plaintiff in ejectment, in his declaration, claims an undivided *moiety* of the premises, and on the trial shows title to only *one-fourth*, it is in the discretion of the judge at the circuit whether he will *non-suit* the plaintiff for the variance, or permit him to take a verdict according to the proof; and if he permit a verdict to be taken, the court *in banc* will allow the plaintiff to amend upon terms.

THIS was an action of *ejectment*, tried at the Chemung circuit in October, 1837, before the Hon. ROBERT MONELL, one of the circuit judges.

The plaintiffs were Michael Beardslee, Phineas Catlin, Guy Hinman, George T. Hinman and Mary Hinman. The declaration contained *four counts*: in the *first* count, the premises in question being thirty-eight acres of land, were claimed *in fee* by *all* the plaintiffs: in the *second*, Beardslee *alone* claimed *three-fourths* of the premises in fee, the same being undivided: in the *third*, Catlin *alone* claimed an undivided *moiety* of the premises in fee; and in the *fourth* count, the three Hinmans in their own names claimed an undivided *moiety* of the premises in fee. The premises formerly belonged to one *Isaac Booth*, and were sold under an execution against him and purchased by one *Darling*, who subsequently conveyed them to *Jacob Swartwood* and *Elijah S. Hinman*. Hinman died, leaving *six* children his heirs at law, *three* of whom were the *Hinmans*, the plaintiffs in this cause, and thus title was shown in them to *one-fourth* of the premises instead of *one half*, as claimed in the fourth count of the declaration. As to the moiety belonging to *Swartwood*, it appeared that in February, 1829, Swartwood executed a deed to *Phineas Catlin* of an undivided moiety of the premises, and delivered it as an *escrow* to one *Darling*, to become absolute and be delivered to Catlin on his executing a bond to the overseers of the poor of the town

Hinman v. Booth.

of *Catharine*, conditioned for the support of *Isaac Booth* during life. It was however agreed that *Catlin* should take immediate possession of the premises. In March, 1829, *Catlin* and the administrator of the estate of *Elijah S. Hinman*, demised the premises to *A. & E. Shelton*, who were to support *Isaac Booth* for the use of the premises, and they occupied the premises until the autumn of 1832. *Isaac Booth* resided with them until July or August, 1832, when he went to reside with his brother *Elijah Booth*, at whose house he died in October following. On the 15th October, 1832, just before the death of *Isaac Booth*, *Swartwood* conveyed his moiety of the premises to *Elijah Booth*; the bond which was to have been executed by *Catlin* never having been executed. It also appeared, that on the 28th September, 1836, the three *Hinmans* named as plaintiffs in this cause executed a quit-claim deed of the premises in question to *Beardslee*, one of the plaintiffs in this cause, he having previous to such deed claimed the premises under various conveyances executed in 1832. The *ouster* in this case was laid in *December*, 1836. The jury, under the charge of the judge, found a verdict in favor of the *Hinmans* for one-fourth of the premises, in favor of *Catlin* for one moiety of the premises, and for the defendant as to the portion claimed by *Beardslee*. The defendant asks for a new trial.

J. A. Spencer, for defendant,

A. Taber, for plaintiff.

By the Court, COWEN, J. The condition upon which *Swartwood's* deed to *Catlin* was deliverable was never fulfilled. *Catlin* agreed to give a bond to the overseers of the poor conditioned to maintain *Isaac Booth* for life, and the deed was to remain as an *escrow* with *Mr. Darling* till that was done. This was a condition precedent, which never was waived by *Swartwood*; and, *non constat*, that the proper bond was ever even tendered. Indeed, the contrary appears; and for this default *Swartwood* disaffirmed the contract to convey, and deeded to *Elijah Booth*, under whom

Hinman v. Booth.

the defendant claimed. It was not enough that Catlin or the Sheltons upon his retainer did in fact maintain Isaac Booth for life. Swartwood had a right to this bond, and, it seems, becoming tired of waiting for it, and being troubled as he said in a business for which he got nothing, he therefore deeded to Elijah Booth, with whom Isaac was living at the time.

The *Hinmans*, it is conceded, had title to *one-fourth* of the premises, but it is said that they cannot recover, because in the declaration the claim *one-half* of the premises. The first answer is, that the objection of *variance* was not made at the trial. But if otherwise, we should now allow the plaintiffs to amend on easy terms, rather than grant a new trial. The case of *Holmes v. Seely*, 17 Wendell, 75, 78 to 80, is not, as supposed, incompatible with such a course. Indeed, it is expressly sanctioned by the cases cited at p. 80, and the opinion of the chief justice there. He thinks the verdict should be sustained in such cases by way of *amendment*, and not by simply overlooking the omission; not by considering title admissible as a matter of absolute right where it varies from the undivided share claimed in the declaration. The distinction is of value, so far at least as it gives the judge at the circuit such control that he may in his discretion exclude the proof, where he sees that the defendant is surprised, or may be otherwise injured by the variance between the pleadings and evidence.

In this case there must be a new trial, unless the plaintiffs consent that the *postea* be so framed that the verdict shall be for the *Hinmans* as to *one-fourth* of the premises in question, and, as to the residue, for the defendant.

Ball v. Gardner.

• **BALL vs. GARDNER & M'PHEE.**

A bond given by a party on suing out an attachment from a justice's court, that he will pay all damages and costs if he fail to recover, extends to the final determination of the cause; a recovery before the justice will not save a suit upon the bond if such recovery be subsequently reversed on error brought.

BOND on suing out an attachment. The plaintiff declared on a bond executed by the defendants, which after reciting that Gardner had applied to a justice of the peace for an attachment against Ball, was conditioned that Gardner would pay to Ball all damages and costs which he might sustain by reason of the issuing of such attachment if Gardner should fail to recover judgment thereon; and in the event of such judgment being recovered, that he should pay to Ball all moneys which should be received by Gardner from any property levied upon by such attachment, over and above the amount of such judgment and interest and costs thereon. After setting forth the bond and condition, the plaintiff averred the issuing of the attachment and the levy of the same upon the goods and chattels of the plaintiff, and that the plaintiff in the attachment failed to recover judgment thereon, whereby an action had accrued, &c. The second count set forth the same matters as alleged in the first count with the additional matter, that by virtue of the attachment the goods and chattels and wearing apparel of the plaintiff were taken and detained from him, and he put to great expense and trouble in defending himself against the attachment and in recovering his property; by means whereof he sustained damage to the amount of \$100, whereby an action had accrued, &c. The third count, after setting forth the bond and condition, the suing out of the attachment, and the seizure of the plaintiff's property, averred that the justice, without issue being joined in the cause, rendered a judgment against Ball in favor of Gardner, for \$33 22 damages, and \$2 89 costs; that Ball conceiving himself aggrieved, removed the proceedings by certiorari into the common pleas of Oneida, where the judgment of the justice was re-

Ball v. Gardner.

versed. By means whereof the plaintiff alleged that he had sustained damages in the loss of the use of his goods and chattels, and in defending the suit before the justice, and in prosecuting the writ of *certiorari*, to a large amount, to wit, &c., whereby an action hath accrued, &c.

To the *first count*, the defendants pleaded, after praying *oyer* of the bond and condition, and setting them out, that the plaintiff suing out the attachment, recovered judgment against the now plaintiff for \$36 11 damages and costs, *traversing* the allegation that he failed to recover judgment. A similar plea was put in to the *second count*, and to the *third count* the defendants *demurred*. To the two first pleas the plaintiff *replied* the suing out of the *certiorari*, the *reversal* of the justice's judgment, and the judgment of the common pleas that he be restored to all things lost by the justice's judgment, and that he recover *twenty-five dollars*, his costs and charges in prosecuting the writ of *certiorari*. The defendants interposed a *demurrer* to these replications.

C. Tracy, for the defendants.

C. B. Gay, for the plaintiff.

By the Court, NELSON, Ch. J. The main question raised upon the pleading is, whether the condition of the bond taken on the suing out of the attachment, extends to and is controlled by the final result in the common pleas; in other words, whether the condition is kept by the recovery of judgment before the justice.

The statute provides for the giving of the bond, and prescribes that it shall be "conditioned to pay such defendant all damages and costs which he may sustain by reason of the issuing such attachment, if such plaintiff fail to recover judgment thereon." 2 R. S. 230, § 29. See also Statutes, Sess. of 1831, p. 404, § 135. The bond is in conformity to the statute. The question has already been decided in respect to the bond given by a *non-resident* plaintiff for the purpose of obtaining a warrant under this act. 7 Wendell, 434. The statute there is, that he must give "*security for*

Ball v. Gardner.

the payment of any sum which may be adjudged against him." The court saw nothing in the language restricting the security to the costs before the justice, but held that the suit on the *appeal* was the same as the one before the court below, and the result fairly within the scope of the condition. These reasons apply with greater force in the case before us. The plaintiff in the attachment binds himself to pay all *damages and costs* that the defendant may sustain *by reason of the issuing of it*, if he fail to recover judgment thereon. Now it is clear that he has failed. The reversal in the common pleas on the certiorari has at least vacated the judgment before the justice; and if it proceeded upon the merits has finally disposed of the subject matter of litigation. *Close v. Stuart*, 4 Wendell, 95; and 9 id. 674, 678. Even if it turned upon technical ground, the suit before the justice is at an end, and a new one must be instituted, unless a new venire is directed to be issued, which, I believe, has never been done in a justice's court. I need not pursue this question, as I am certain it has already been considered and decided in this court, though the case has not been reported.

It is said the replications to the first and second pleas on the record before us, depart from the declaration. I think not. The counts charge that Gardner failed to recover judgment before the justice; the pleas set up a judgment recovered there; the replications show a reversal in the common pleas, which fortifies and maintains the allegation in the counts. This must be so, if we are right in the conclusion that the bond is not restricted to the judgment as recovered by the party before the justice, but extends to the final result of the cause. The objection to the *special damages* alleged in the second count, if well taken, is unavailing here, for the matter, if inapplicable to a case of this kind, can be reached only by a *special demurrer*, and cannot be taken advantage of by a demurrer to the replication.

Judgment for plaintiff.

THE HERKIMER MANUFACTURING AND HYDRAULIC COMPANY *vs.* SMALL.

Where an *incorporated company*, the capital stock of which is divided into shares, are authorized by their act of incorporation to make *calls* upon the stockholders for the payment of the sums by them respectively subscribed, in such proportions and at such times as the directors see fit, *under penalty of forfeiture* of the shares subscribed and of the previous payments made thereon, the company may, in case of non-payment, *proceed by suit* to recover the amount of the calls, or *may declare a forfeiture of the stock*.

So even *after suit brought*, they may declare a forfeiture of the stock, and such latter proceeding cannot be pleaded in bar of the *further maintenance of the suit*, where the value of the stock forfeited is not equal to the money due to the company. The stock holder, however, is entitled in such case, on the assessment of the damages, to insist that the *value of the stock* forfeited shall be allowed in mitigation or diminution of the sum which the plaintiffs would otherwise be entitled to recover.

Where the stock forfeited is equal in value to the money which may be demanded by the company, the forfeiture may be pleaded in bar ; but a plea of forfeiture without such averment of value is bad.

It seems that payment may be pleaded to part of a count, and the *general issue* as to the residue.

Where by the rules of pleading a defendant cannot plead matter which yet is essential to his defence, he may give it in evidence either to *defeat* or *mitigate* the plaintiff's claim. Under this rule any matter, whether it arise before or after suit brought, which is in its own nature admissible but can not be pleaded, may be given in evidence on the general issue or on the execution of a writ of inquiry.

DEMURRER to plea. The plaintiffs declared on subscriptions for stock made by the defendant. The plaintiffs are an *incorporated company*. The defendant subscribed for 21 shares of \$100 each, upon which stock, calls were made to the amount of *ninety per cent.* and for the non-payment of which, upon the shares owned by the defendant, this action was brought. The facts were set forth in various forms in *five* separate counts of the declaration, which also contained a *sixth* count of *indebitatus assumpsit*, in which the plaintiffs demanded \$3000, for money lent and advanced, paid, laid out and expended, and had and received, " and for other money then and there owing from the said defendant to the said plaintiff for twenty-one shares of stock of the capital stock of the said Herkimer Manufacturing and Hy-

Herkimer M. and H. Co. v. Small.

draulic Company before that time sold to the said defendant by the said plaintiffs." The suit was commenced on the 19th December, 1834. The defendant *pleaded*, 1. *non assumpsit*, and 2. as to the first, second, third, fourth and fifth counts, and *as to so much of the sixth count* as relates to his subscription for shares of the capital stock of the company, by leave, &c. he says that the plaintiffs *ought not further to have or maintain their aforesaid action*, &c. because he says that by the act of incorporation of the company the directors are authorized to make *calls* for payments upon subscriptions to be made by the subscribers to the stock of the company, *under penalty of forfeiture* of shares and of previous payments made; that calls were duly made *as set forth* in the several counts of the declaration, and that he, the defendant, having neglected to make the payments required to be made by him, the directors of the company for the time being, on the 22d June, 1836, *after the commencement of this suit*, in pursuance of the provisions of the act of incorporation, made an order declaring the several shares of stock subscribed for by him and all payments made thereon *forfeited*, for the non-payment of the instalment which, on the *last call* for stock payments, was payable on 15th May, 1835; by reason whereof the several shares of stock subscribed for by him *became and were forfeited*, and he thereby became and was discharged from the several contracts in the several counts of the declaration mentioned, concluding with a verification and prayer of judgment. To this second plea the plaintiffs demurred.

J. A. Spencer, for the plaintiffs.

M. T. Reynolds, for the defendant.

By the Court, COWEN, J. It is objected that the plea does not even profess to answer the whole of the sixth count, nor does it aver such a notice of a call for the 15th of May as shows the forfeiture to be regular; and several other formal objections are made, which it is not necessary to consider, for we are satisfied that the principle on which the pleader relied is unsound.

Herkimer M. and H. Co. v. Small.

The plea concedes that when the suit was commenced, the plaintiffs had a good cause of action. The defendant had promised to pay, which he had refused to do after demand and notice. This, it is true, was in consideration of the shares of stock to which he entitled himself by his subscription; and it is equally true they have become forfeited. The consideration is gone; but it is by his own default. The power given by the legislature was a concurrent remedy, the effect of enforcing which is well understood. The act, Statutes, sess. of 1833, p. 192, § 4, under which the defendant subscribed, declares that "it shall be the duty of the directors for the time being to call for and demand of the stockholders respectively, all such sums of money by them subscribed, at such times and in such proportions as they shall see fit, under penalty of forfeiture to the said company of their shares and all previous payments made thereon, always giving thirty days notice, to be published in a newspaper printed in the county of Herkimer, and in the state paper, of such call or demand." This clause has long prevailed in our acts of incorporation, and there have been several adjudications upon its effect. The 13th section of the New Lebanon and Hudson Turnpike act, in K. & R.'s revision of the laws published in 1801, 2 vol. p. 469 to 475, has been followed by the act in question. That section was considered by the supreme court in *Union Turnpike Co. v. Jenkins*, 1 Caines' R. 381, where the provision is also recited at large, and afterwards in the same case on error, 1 Caines' Cas. in Error, 86, A. D. 1803. These decisions left it doubtful whether a proceeding under the clause of forfeiture were not the *sole remedy*, till, in 1812, this court considered it as standing clear of that question, and held that an action lay on such a subscription. *Goshen Turnpike Co. v. Hurtin*, 9 Johns. R. 217. This has ever since been regarded as the settled doctrine, see *Highland Turnpike Co. v. McKean*, 11 Johns. R. 89, *Dutchess Cotton Manufactory v. Davis*, 14 id. 238, and places the proceeding in question on the precise footing of other cumulative remedies provided for by the agreement of the parties. It is the same as if the defendant had, in addition to the promise

Herkimer M. and H. Co. v. Small.

of payment, agreed that, on default, the directors of the company should have power to declare the forfeiture of the stock; in other words, that the company might resume their title to the stock sold. The effect of such a proceeding is perfectly well settled in every other department of business. When the mortgagee of real or personal estate takes the thing pledged and sells it, or finally converts it to his own use, he is paid so much only towards his debt as the thing *sold for*, or *was worth* at the time of the conversion. *Globe Ins. Co. v. Lansing*, 5 Cowen, 380. *Lansing v. Goelet*, 9 id. 346, 352, 353. *Spencer v. Ex'rs of Harford*, 4 Wendell, 381. *Case v. Boughton*, 11 id. 106. And where the equity of redemption is released, or a strict foreclosure resorted to in any form, then so much is paid as the value of the thing mortgaged, at the time when the title becomes absolute in the mortgagee amounts to. *Spencer v. Ex'rs of Harford*, 4 Wendell, 381. *Morgan v. Plumb*, 9 id. 287. This doctrine is very clearly laid down and traced to its consequences, by Chief Justice Savage, who delivered the opinion of the court in the cases last cited, and several previous authorities are referred to by him. The decisions relate mainly, if not exclusively, to real estate; but the principle is the same in regard to personal, when the foreclosure is complete, as by sale or release of the equity of redemption, or, as was directly held in *Case v. Boughton*, by taking possession of a mortgaged chattel after the forfeiture for non-payment, and holding till a sale may be effected. See also per Nelson, J. 12 Wendell, 62, 63. If the value of the thing be less than the debt, the debt is not extinguished by the foreclosure, except when the mortgage or other pledge stands as the sole security. Jones, Chancellor, in *Lansing v. Goelet*, 9 Cowen, 352, 353. *Andover and Medford Turnpike Co. v. Gould*, 6 Mass. R. 40. *The same v. Hay*, 7 id. 106.

The case at bar was likened, on the argument, to an entry by the lessor for condition broken, which was said to extinguish a covenant to pay rent. But the contrary has been adjudged as to rent which accrued before re-entry, although the indenture of lease provided that the lessor un-

Herkimer M. and H. Co. v. Small.

der such re-entry was to have the premises again, "as if the indenture had never been made." *Hartshorne v. Watson*, 4 Bing. N. C. 178.

It follows that the forfeiture of the stock in the case at bar, which is but another name for foreclosure, was not necessarily an extinguishment. The plea, then, is the same in effect as that in *Spencer v. Ex'rs of Harford*, wherein a plea that the plaintiff had acquired the equity of redemption in premises mortgaged, as a collateral security to his bond, was held bad, as being but an answer to part of the action for want of an averment that the acquisition was, at the time, equal to the amount due on the bond. According to the rules of pleading adopted in this court, nothing can be pleaded which is not an answer to the whole declaration or some count in the declaration. *Hick v. Coates*, 2 Wendell, 419. And the plea must be sufficient in itself. It cannot be helped by another distinct pleading, though several pleas may have the effect of one. Thus, the general issue, may be pleaded to part of a declaration or count, and payment to the residue; and where the defence is known to be in truth complete, it is right to plead in that way. If it be incomplete, yet this shall not prejudice the defendant; for where he cannot plead the matter, he may give it in evidence, either to defeat or mitigate the plaintiff's claim according to its effect. Lord Coke, after mentioning several cases wherein a defence must be pleaded, adds, all that hath been said must be taken with the caution, "that whensoever a man cannot have advantage of the special matter by way of pleading, there he shall take advantage of it in the evidence." Co. Litt. 283, a. This is, in general, the proper course where the matter is but a partial defence; for, though it may be set up in connection with a denial of the residue or other supposed matter which is special, yet the plea as to the residue would be untrue; and no man is bound to plead a false plea, which, in most cases, would be stricken out on motion, with costs; and is many times contrary to professional morality.

It is matter of common experience within the rule mentioned by Lord Coke, both on the general issue and after judgment by default, that any matter, whether it arise be-

Herkimer M. and H. Co. v. Small.

fore or after suit brought, which is in its own nature admissible, is received in evidence on the trial, or before the sheriff, on executing a writ of inquiry. In *trover*, for goods, says Buller, J., N. P. 299, the defendant may give in evidence that he took them for toll, on the plea of not guilty, because he could not plead it specially, as he might in trespass. So, doubtless, he might show on the same issue, or on executing a writ of inquiry, that the plaintiff had received back the goods either in *trover* or trespass; for this, though it could not be pleaded in bar, would yet go in mitigation of damages.

In the case before us, the company have, according to the plea, thought proper, pending the suit, to declare a forfeiture of the defendant's stock; and if they have derived any pecuniary advantage from such a proceeding, the defendant should have the benefit of it. Such is the plain justice of the case. The real cash value of the stock at the time when it was declared forfeited, should be deducted from the nominal value, and the verdict be for the balance. Thus, if the stock were at par, the damages should be nominal, or at most for the interest to the time of forfeiture, on the shares in demand; if 50 per cent. below par, then the plaintiffs should recover but 50 per cent. with interest, the jury having regard to the cash value of the stock, supposing it to have been re-issued within a reasonable time after the company had resumed it. In short, the measure of damages is like that on a failure to take and pay, under a sale at auction. If the value obtained, or which might be obtained on a re-sale, be short of the sum bid upon the first sale, the vendor may recover the deficiency, with other damages which he has sustained by the default. Babington on Auctions, 138, 139.

The plea is overruled, because it does not aver that the value of the stock forfeited was equal to the nominal value of the stock subscribed, with interest to the time when the resolution was passed. Could that averment be maintained, it would, we think, constitute a perfect defence, within the principle of *Case v. Boughton*.

Judgment for plaintiffs on demurrer; leave to amend on payment of costs.

Anderson v. Coonley.

ANDERSON vs. COONLEY.

A *general agent* entrusted by his *principal* with power to make and enter into contracts for the purchase of grain, has power to modify or waive a contract made by him in respect to such grain.

The *authority* of an agent being limited to a *particular business*, does not make it *special*; it may be as general in regard to that, as if its range was unlimited.

ERROR from the Onondaga common pleas. Coonley sued Anderson in the court below, for the non-delivery of a quantity of barley, agreed to be sold at a certain price. On the trial of the cause, it appeared that the contract for the sale and purchase of the barley was made between Anderson and one W. S. Worthington, who was the agent of Coonley, to contract for the purchase of barley; and that the barley was not delivered pursuant to the contract. The defendant offered to prove that soon after the contract was made, Worthington sent word to him that he *did not want his barley*, as it had been injured: which evidence was objected to by the plaintiff, on the ground that it had not been shown that Worthington had *authority to discharge the contract*: which objection was sustained by the court, and the defendant excepted. The plaintiff obtained a verdict and entered judgment thereon. The defendant sued out a writ of error.

F. G. Jewett, for plaintiff in error.

L. B. Raymond, for the defendant in error, cited Paley on Agency, 164; 1 Livermore on Agency, 107, 8; 1 Bailey's S. C. R. 648.

By the Court, NELSON, Ch. J. I think the common pleas erred. A *general agent* is bound to exercise a sound discretion in the business in which he is engaged, and he possesses all the necessary implied powers within the scope of his authority for this purpose. An authority to settle accounts, implies a power to allow credits; to sell a horse, to make a sale in the usual way. The agent stands in the

CASES IN THE SUPREME COURT.

Anderson v. Coonley.

his principal, in respect to the particular business, and conduct it as a prudent and discreet man would in his own affairs. The doctrine in respect to a *special agent* is different: as a general rule, it may be said *he* is confined to his instructions; but the authority of the agent being limited to a *particular business* does not make it *special*; it may be as *general* in regard to that, as if the range of it was unlimited.

[It appears to me that the general authority to Worthington to *contract* for barley, reasonably implied power to *modify* or *cancel* the contracts which might be made by him. This power is essential to enable the agent to protect the interests of his principal; otherwise, he is altogether disabled from getting rid of an improvident engagement, and is circumscribed in the exercise of his discretion when it might be most essential in the course of the execution of his powers. I venture to say such is the general understanding of *principals* and of the business community. It cannot be an unauthorized stretch of power to modify contracts which a party is generally authorized to enter into for another: and if he may do this, he may upon the same principle waive them altogether. There can be no danger to the *principal* in this latitude of construction of the powers of the *agent*; for if he be willing to trust the agent with power to *bind* him in the making of a contract, he surely cannot object that he should have the power to *absolve* him from contracts made.] If this view be correct, the court below erred in rejecting the evidence offered; for had it been received, a waiver of performance would have been shown which would have been an answer to the action. Judgment must be reversed, and a *venire de novo* be issued from the court below; costs to abide event.

 Morris v. Scott.

MORRIS vs. SCOTT.

An action on the case for a malicious prosecution lies against a party who *falsely and maliciously* prosecutes another, although the court in which such prosecution was had was utterly *destitute of jurisdiction* in the matter; consequently it is not necessary in the action for the malicious prosecution to aver or prove that the court in which were the proceedings complained of had jurisdiction, provided that the *malice* and *falsehood* of the charge be put forward as the *gravamen*, and the arrest or other act of trespass be alleged merely as a consequence.

ERROR from the Allegany common pleas. This was an *action on the case for a malicious prosecution*, brought by Morris against Scott, for maliciously, and, without probable cause, making complaint to a magistrate against Morris, for aiding and assisting in the removal of the property of a third person, for the purpose of *defrauding* the creditors of such person, suing out a warrant for his arrest, causing him to be arrested and brought before the magistrate, and subsequently tried by a court of *special sessions*; by which court he was acquitted and discharged. The defendant pleaded *non cul.* The parties went to trial and the plaintiff offered to prove the facts as above stated. The defendant objected to any proof being received, for the want of averments in the declaration that either the *justice* to whom the complaint was made, or the *court* of special sessions before whom the plaintiff was tried, had *jurisdiction* in the matter. The court of C. P. sustained the objection and *nonsuited* the plaintiff, who sued out a writ of error.

S. B. Cooley, for the plaintiff.

G. Miles, for the defendant.

By the Court, COWEN J. Authorities are cited, by the counsel for the plaintiff in error, that an action on the case lies for a *malicious prosecution*, although the court in which it is instituted had no jurisdiction. *Goslin v. Wilcock*, 2 Wils. 302. In *Smith v. Cattel*, id. 376, it is said "the stinging

 Piper v. Manny.

of these kind of actions is *malice* and *falsehood*, and the injury done in pursuance thereof." The question has also been much discussed in a later case, on error: *Elsee v. Smith*, 1 Dowl. & Ryl. 97; 2 Chit. R. 304. S. C. A party who pursues a man by arrest in a court destitute of jurisdiction, may be sued in *trespass* for the false imprisonment; and the objection is, that whatever might have been his malice, and however plain the want of probable cause, the injured man cannot bring an action on the case, especially if he mention and claim damages in his declaration for the arrest and imprisonment. In such case he has committed an assault and false imprisonment, an act which, in its own nature, is a trespass *vi et armis*. But taking the authorities together, they give a decided countenance to an action on the case, though there may be a total want of jurisdiction, provided the *malice* and *falsehood* be put forward as the *gravamen*, and the arrest or other act of trespass be claimed as the consequence. This case, therefore, as it stood at the common law, seems properly set down by Mr. Chitty as presenting a right to elect between case and trespass. 1 Chit. Pl. 127, Phil. ed. of 1828. But be that as it may, a clear right of election arises under the statute, 2 R. S. 456, 2d ed. § 16. By that section, *case* may now be brought for almost any trespass affecting the person or personal property. Conceding therefore that the declaration failed to show jurisdiction, the evidence offered should have been received. The judgment must be reversed, and a *venire, de novo* go from the court below, the costs to abide the event.

 PIPER vs. MANNY.

An innkeeper is responsible for the safe-keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open unenclosed space near the public highway.

ERROR from the Montgomery common pleas. This was an action on the case brought in a justice's court by Piper

Piper v. Manny.

against Manny as an *innkeeper*, for the loss of a quantity of butter. The servant of the plaintiff put up for the night at the house of the defendant; he had a sleigh load of butter, and inquired of the *hostler* if there was a *barn* in which the load could be placed, who answered that it was as safe in the yard as under lock and key. The yard was an *open unclosed space*, within 16 or 18 yards of the centre of the travelled part of the highway, on the opposite of the highway from where the defendant's house was situate. The load was placed near an open shed, where the *hostler* directed it should be placed. The defendant was told in the evening that there was butter in the load. In the morning a *tub of butter* was missing. The cause was tried in the justice's court by a jury, who found a verdict for the plaintiff for \$24 50. The common pleas of Montgomery, on a *certiorari* sued out by the defendant, *reversed* the justice's judgment, assigning as a reason for their judgment that the defendant was not liable as an *innkeeper* for the lost butter, because the butter was not brought *within the inn*, nor was it *received into Manny's possession or keeping*, but was left by Piper's agent in the highway; and because Manny or his servant was *not guilty of any negligence* that would render him liable for the butter. The plaintiff sued out a writ of error.

E. S. Capron, for plaintiff.

D. Wright, for defendant.

By the Court, NELSON, Ch. J. The only question in the case is, whether the goods were received into the care and keeping of the *innkeeper*, within the meaning of the terms of his common law liability; that is, *infra hospitium*. If they were, the question of *negligence* of the defendant or his servants has nothing to do with the case. 5 T. R. 275, Buller, J. The goods need not be within the building strictly denominated the inn, it being well settled that the barns and stables come within the definition. *Calye's case*, 8 Rep. 63. *Clute v. Wiggins*, 14 Johns. R. 175. *Mason v. Thompson*, 9 Pick. 280. In *Clute v. Wiggins*, the load of grain

Piper v. Manny.

was put into the waggon-house ; and in *Mason v. Thompson*, the chaise and harness under an open shed, as in the present case, except the yard was enclosed with a fence. So it has been held that a horse of the guest, put into a pasture lot, if without his special direction, is *infra hospitium*, within the meaning of the original writ, which Lord Coke says is the foundation of the common law liability. *Calye's case*. The place, therefore, where the goods are deposited, is not the test ; it is whether they are *in the custody of the innkeeper*, or *at the risk of the guest*. This must necessarily depend upon the particular circumstances of each case. *Prima facie* the innkeeper is liable, and the *onus* lies on him to show the contrary. 5 T. R. 273. 4 Maul. & Sel. 306. 8 Barn. & Cres. 9. And he cannot discharge himself from this common law liability without the concurrence of the guest. Id. 7 Carr. & Payne, 213. *Calye's case*. 3 Bac. Abr. 664. Testing the case before us upon these principles, it appears to me there cannot be a doubt of the defendant's liability.

The load was left in the place directed by the defendant's servant, after an assurance it would be as safe there as if under lock and key, and this made on an intimation that the goods would be exposed. The traveller is not obliged to give special instructions in this respect ; on the contrary, if the innkeeper wishes to exonerate himself, unless the goods are deposited in a particular place, or kept in a special manner, he must say so. *Calye's case*. 4 Maule & Sel. 306. 8 Barn. & Cres. 9. The last case is very strong on this point. There it was the custom to take the luggage of travellers to their bed rooms, unless contrary orders were given. One package, containing silks of various kinds, was taken by direction of the guest to the commercial room. On the next day he took it out to exhibit his goods to different customers ; some were sold, and the package was taken back to the commercial room, from which it was afterwards stolen. It was insisted that by the special direction given, which tended to expose the goods in a greater degree than if the usual practice had been observed, the guest had exonerated the innkeeper within the case of *Burgess v. Clement*,

Mazuzan v. Mead.

4 Maule & Selw. 306. But the court answered this by saying, that if it had been intended by the defendant not to be responsible unless the goods were placed in the bed room or other place of security, he should have said so.

The liability of the *innkeeper* is strict, and, doubtless, often severe, but not more so than that of the *common carrier*; both are considered *insurers* of the goods while in their keeping. As an equivalent they have peculiar privileges; the former of these also by special license. But whatever may be thought of the principles of their responsibility, it is not for the court to innovate upon them: we must apply them as they have been applied by our predecessors, until otherwise directed by the competent authority. I am satisfied such application subjects the defendant in this case to liability.

Judgment reversed.

MAZUZAN vs. MEAD.

The transfer and guaranty of a note for a larger sum in consideration of a less sum, is not per se usurious; the guarantor in such case, when called on for payment, being liable only to refund the amount received by him, with the interest thereof.

DEMURREE to declaration. The plaintiff declared that the defendant, being the holder of a promissory note made by W. & E. Anderson, bearing date 15th September, 1837, whereby the makers promised to pay to the defendant or bearer \$210, with interest, by the first day of November next after the date thereof, he, on the 15th of October, 1837, by a *memorandum* endorsed on the back of the note and signed by him, *for the consideration of \$200 paid to him* by the plaintiff, assigned and transferred the note to the plaintiff, and *guarantied* the payment thereof. The plaintiff then averred, that when the note made by the Andersons became due and payable, according to its tenor and effect, *the makers thereof did not pay the note*, whereof the defendant had notice, and whereby he then and there became lia-

Mazuzan v. Mead.

ble to pay *the said sum of money in the said note specified*, and concluding with the usual breach that the defendant had not paid, &c. The plaintiff attached to the declaration a copy of the *note* and of the *memorandum* assigning and guaranteeing the same, adding thereto these words: "The plaintiff claims on the above \$100, and interest thereof from 15th September, 1837, and \$100, and interest thereof from 15th October, 1837, only." He also endorsed a *bill of particulars* in these words: "The particulars of the plaintiff's demand in this cause is on the *guaranty* on the back of the note, a copy of which is above set forth." The defendant *demurred*, and assigned for cause of demurrer that the contract declared upon was upon its face *usurious*.

J. L. Curtentius, for defendant.

A. A. Boyce, for the plaintiff, insisted that the contract was *not usurious*; that according to the settled law of this state, the plaintiff can recover *only* the amount paid by him to the defendant, together with the interest thereof; and, in support of this position, cited *Braman v. Hess*, 13 Johns, R. 52; and added, that the plaintiff asked no more.

By the Court, COWEN, J. The contract, as set forth in this count, is said to be expressly usurious. In consideration of \$200 advanced, the defendant agrees to pay, on a subsequent day, \$210, with interest on the latter sum from a previous day. It is answered that an usurious intent is not to be inferred, inasmuch as the plaintiff cannot in legal effect recover, and does not in truth seek to recover more than he advanced, with the legal interest. If such were the express agreement at the time, it would clearly take away the sting of usury; and if that appear upon the face of the declaration to be but the legal effect of the *guaranty*, then the case is the same. Had the defendant simply endorsed the note, leaving himself to be charged in the usual way by demand and notice, the transaction would not have been usurious. That was held by this court, and afterwards by the court of errors, in *Cram v. Hendricks*, 7 Wen-

Sherrill v. Campbell.

dell, 569, on the express ground that only the consideration advanced was in construction of law secured by the endorsement. We think this case is the same in principle. The only difference is, that the guaranty being absolute, there is a waiver of demand and notice. *Allen v. Rightmere*, 20 Johns. R. 365. True, the guaranty is equivalent to a direct promissory note, with superadded security; but so was the endorsement in *Cram v. Hendricks*. - We are not called upon to support the principle of that case; it is enough that we cannot distinguish its principle from that of the one before us.

Judgment for plaintiff on demurrer, with leave to defendant to amend.

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SHERRILL vs. CAMPBELL.

The service of *an order staying further proceedings* upon an execution, granted by a commissioner upon the allowance of a writ of error, does not operate as a *supersedeas* to discharge from custody a defendant who was arrested and committed to jail before the service of the order.

ERROR from the Washington common pleas. Campbell sued Sherrill as sheriff of the county of Washington, for the escape of one Abram Rowan an imprisoned debtor. The suit was brought in a justice's court, where judgment was rendered for the plaintiff. The defendant appealed, and on the trial in the Washington common pleas, it was shown that Rowan was arrested on a *ca. sa.* at the suit of the plaintiff on the *fifth* day of *August*, 1834, and committed to the jail of the county, and that on the following day he *escaped* and went at large. The defendant *offered to prove that after his arrest and commitment*, and on the evening of the same *fifth* day of *August*, Rowan sued out a writ of error to remove the judgment upon which the *ca. sa.* had been issued, from the common pleas of Washington to this court, put in bail to prosecute the same, and obtained an order from the commissioner, who allowed the writ *staying all proceedings upon the execution*, and also all further proceed-

Sherrill v. Campbell.

ings upon the judgment until the further order of the court; that on the *sixth* day of *August*, notice of the issuing of the writ of error and the order of the commissioner, were duly served upon the attorneys of the plaintiff, and upon the sheriff; and that *after* the service of such notice, and not before, Rowan, *escaped*, &c. The defendant also offered to prove that Rowan did not give bail for the liberties, all which evidence thus offered to be given, was objected to by the plaintiff, and excluded by the court. The defendant excepted to such decision, and the jury under the charge of the court, found a verdict for the plaintiff. The defendant sued out a writ of error.

J. Crary, for the plaintiff in error, insisted, that from the time of the service of the order of the commissioner upon the sheriff, it would have been illegal for him to have imprisoned Rowan. The very object of the statute in authorizing an *order to stay*, was to arrest proceedings upon the execution in whatever condition they might be; no one would deny that such an order would suspend proceedings upon a *fi. fa.* at any moment before the money made upon the sale of the defendant's property was paid over to the plaintiff; and yet it is contended on the other side, that it has not the same effect upon a *ca. sa.* If there be a difference between the two kinds of execution in reference to this statute, the proceedings upon the *ca. sa.* should be arrested in preference to those upon a *fi. fa.* The latter is called a *final* execution, and is the end of the suit, but not so a *ca. sa.*; it is said to be *quousque*, as tending to an end, but not as being final, 6 Reports, 87. A *ca. sa.* is not executed by the mere arrest of the defendant; it is merely *in course of execution*, and so continues whilst the defendant remains imprisoned.

B. Blair & C. L. Allen, for the defendant in error, admitted that if the *ca. sa.* had not been *fully executed*, the order to stay would have operated as a *supersedeas* under the provisions of the revised statutes, 2 R. S. 596, 7, § 29, 30; but they contended that the *arrest* of the defendant up-

Sherrill v. Campbell.

on the *ca. sa.* even without commitment, was a *full execution* of the process. Graham's Pr. 364. 1 Archbold's Pr. 304, and cases cited, and 8 Wendell, 545. The fact that the defendant had not given bail for the liberties, did not alter the case; the bail is for the indemnity of the sheriff, and if he chose to let the defendant go at large upon the limits without bail, he did so at his peril. 3 Johns. Cas. 73.

By the Court, NELSON, Ch. J. The sheriff having taken Rowan into custody on the *ca. sa.* before the service of the order to stay execution, the question is whether the subsequent service operated to discharge him from the commitment. A writ of error and putting in bail clearly would not have had that effect before the statute, Willes, 271, 280; and the decision therefore must depend upon the interpretation of the statute. It provides, 2 R. S. 569, § 30, if no execution shall have been issued, the service of the order shall stay the issuing thereof; if one shall have been issued, it shall stay the *further* execution thereof. The execution of the *ca. sa.* is by arresting the defendant and committing him to jail—indeed his arrest is, *per se*, a complete execution, as he is then, in the contemplation of the law, in its custody, Willes, 280, and the commitment to the jail is merely for the purpose of safe-keeping. An escape *before* is attended with all the consequences of one *after* commitment. 8 Wendell, 545.

The giving of bail for the limits is no part of the execution of the process; it is but the means of relaxation from the rigor of execution. 3 Johns. Cas. 73. Much less is the receipt of the debt; that is in the way of discharge from execution.

Judgment affirmed.

Burr vs. Mills.

Where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance are flowed by a mill dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an *implied reservation*.

If the owner had *sold and conveyed the mill* to a third person, it would have been otherwise; then the right to flow the land would have passed as an incident to the purchaser of the mill, and could not have been cut off by the grantor.

A clause in a deed in these words: "Provided, nevertheless, that nothing above mentioned shall be so construed as to injure *the privileges heretofore enjoyed* with regard to raising water for the benefit of *my saw mill* where it now stands, or others if erected at or near the same place," was held in this case to be a *reservation commensurate* with the grantor's estate in the whole premises previous to the conveyance, and was not limited to his *own life*; and that a *devise* subsequently made by such grantor to his grandchildren of the east half of the mill lot together with *all the rights appurtenant to the same*, mill privileges, &c., passed the *right to flow* reserved in the deed.

THIS was an action on the case, tried at the Montgomery circuit in May, 1837, before the Hon. JOHN WILLARD one of the circuit judges.

The suit was brought for the flowing of lands of the plaintiff, and obstructing the operations of a mill owned by him, by means of a dam erected by the defendant across a stream upon which the mill of the plaintiff is situate. The plaintiff *James Burr*, showed title to *one portion* of the premises, part of which was overflowed, under a deed executed to him by *Nathaniel Burr*, bearing date 27th April, 1801; and to *another portion*, part of which was *also overflowed*, under a deed executed to him by *Nathan Burr*, bearing date 10th March, 1809, containing the following *reservation*: "Reserving, however, out of the premises above conveyed a *right of flowing* such part of the said premises as may be necessary for a mill pond at or near the place where the *old mill* stood, by erecting a dam at or near the old dam, for the benefit of mills; if erected, the water not to be raised more than to be as high as a large rock in the old pond or creek." The *mill* of the plaintiff was erected about

Burr v. Mills.

the year 1823, *on the premises conveyed to him by Nathan Burr*. In 1835 the father of the defendant erected a mill and dam on the same stream on which the plaintiff's mill was situate, *below the plaintiff's mill*, which dam raised the water in the stream and set it back upon the wheels of the plaintiff's mill, so as entirely to render the mill useless, and also *overflowed* about three-fourths of an acre, *a portion of the premises* conveyed to the plaintiff by *Nathaniel Burr*, and rendered it useless. The father of the defendant died in 1836, and the defendant succeeded him as his heir at law, in the possession of the mill built in 1835. On this evidence and proof of the damage sustained, the plaintiff rested. The defendant then gave in evidence a deed from *Nathaniel Burr* to *Nathan Burr*, bearing date 27th April, 1801, conveying certain premises, *including the premises* subsequently conveyed by *Nathan Burr* to the plaintiff, containing the following *proviso*: "provided, nevertheless, that nothing above mentioned shall be so construed as to injure the privileges heretofore enjoyed with regard to raising water *for the benefit of my saw mill* where it now stands or *others* if erected at or *near* the same place." In 1824 *Nathaniel Burr* died, having previously by his last will and testament *devised* to four grandchildren in fee, the east half of the mill lot, as commonly called, *together with all the rights appurtenant to the same mill, privileges, &c.*, which title thus devised, subsequently to wit, in 1835, became vested in the father of the defendant. It was admitted that at the time of the conveyance from *Nathaniel Burr* to *Nathan Burr*, to wit, in 1801, *Nathaniel Burr* had a saw mill and dam on the premises devised by him to his grandchildren, *near* where the defendant's mill and dam now are; that the same was carried off by a freshet in 1804; that *Nathaniel Burr* made preparations to *rebuild* the same before his death; that after his death, and when the plaintiff was about building his mill, the plaintiff said that the right to build the dam belonged to the *devisees* of *Nathaniel Burr*, but that they would never agree and build the dam. The judge ruled that the defendant had not shown title to erect and keep up the dam and to overflow *any part* of the lands

Burr v. Mills.

of the plaintiff; and the jury under his direction found a verdict for the plaintiff. The defendant moves for a new trial.

J. W. Cady, for the defendant.

D. Cady, for the plaintiff.

By the Court, COWEN, J. With regard to that part of the premises conveyed by Nathaniel Burr to the plaintiff in 1801, the deed reserved no right of flowing it. A small portion of this is penetrated by a turn of the creek, where the water is raised so as to injure the land. The defendant is clearly liable for this injury. After having sold the land absolutely, Nathaniel Burr, the testator, had no right of flowing left, which he could devise to his four grandchildren. It can make no difference that there was then a dam built which flowed this land. If a man convey land which is covered by his mill pond, without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another, which he is accustomed to use as a way; he then conveys the former, without reserving a right of way; it is clearly gone. A man cannot, after he has absolutely conveyed away his land, still retain the use of it for any purpose, without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plough and crop his land.

If the mill had first been sold by Nathaniel Burr to another, it would have been different; for the right of flow would have passed to that other as an incident and could not then be cut off by the grantor. This distinction is plainly derivable from authorities which will be presently considered.

The judge in his charge also denied the right of the defendant to flow those parts of the creek which lie within the boundaries of the land conveyed in 1801 to Nathan Burr, and by him in 1809 to the plaintiff. These deeds both reserved the right of flowing; but the material clause

Burr v. Mills.

to be considered is that in the deed of 1801, from Nathaniel Burr, who, it is insisted by the defendant, reserved by that deed ~~an~~ hereditary easement or right of flow, which by will he transmitted to his grandchildren, from whom the defendant derived his title. The words, after conveying in the usual form, are, "provided nevertheless that nothing above mentioned shall be so construed as to injure the privileges heretofore enjoyed, with regard to raising water for the benefit of my saw mill where it now stands, or others if erected at or near the same place." It is insisted by the plaintiff's counsel, 1. That this is a reservation but for the life of the grantor; and 2. If in fee, yet the easement did not pass by the grantor's devise to his grandchildren of the mill lot, "together with the rights appurtenant to the same, mill privileges, &c."

1. If the clause in the deed were a reservation to the grantor, he being named as *the person* to whom the easement was reserved, then he would have had but a life estate; and such are the cases in the book cited to this point against the defendant. 19 Vin. Abr. 119, 120 and 121; (*N*), pl. 2, 3, 4, 7. The book says, if the rent be reserved to *him*, or to *him*, his *executors* and *assigns*, his heir shall not have the rent, and it shall determine by his death. It is confined by *the words* to the lessor, &c. But the same book says, if such a reservation be general, as a rent *during the term* without saying more, the law will say this shall go to the lessor's heirs and assigns. *Id.* 119, (*N*), pl. 1. And to this the book cites Co. Litt. 47, and several other authorities.

The same distinction holds of an exception. Thus it is said in Shep. Touch. 100: "If one grant lands in fee, excepting the trees or any other thing to the *grantor*, without saying *and to his heirs*, by this exception, the thing excepted is severed only for the life of the grantor, and then it shall pass with the rest of the thing granted. But if the thing be excepted *indefinitely*, without saying for the life of the grantor, &c., nor how long, this shall be taken to be an exception during the estate." Again, "By an exception, the thing excepted is taken wholly out of the grant, and is no parcel of the thing granted." 4 Bart. Conv. 400. "That

Burr v. Mills.

which is excepted out of the general words is in the same case as if it had never been touched." Plowd. 361. Per Archer, J. in *Bosworth v. Farrand*, Carter's R. 99; and *vid.* Dyer, 264, b. There can be no doubt that Nathaniel Burr, by the clause in his deed to Nathan Burr, intended to save the whole right which he had to flow this land previous to the giving of the deed. That was a right in fee. The amount is, "Nothing shall be so construed as to injure the privilege heretofore enjoyed of flowing for the benefit of my saw mill." That privilege was absolutely to him and his heirs and assigns. He might hold, assign or devise it. It appears to me, then, that whether we consider this as the reservation of a thing *de novo*, or as an exception, the result must be the same. It is not tied up to the person of the grantor. The privilege is to remain untouched. The words, "my saw mill," are merely descriptive of the privilege, as showing where it is to be exercised. I think the reservation was in law commensurate with the grantor's previous estate; in other words, a fee, within the distinction laid down in the books. Suppose Nathaniel Burr had sold all his land, with an express exception of the mill without any thing more, the right to a necessary flow for the use of the mill would have been reserved as an incident. *Nicholas v. Chamberlain*, which will be hereafter noticed, shows this. In *Jackson ex dem. Hasbrouck v. Vermilyea*, 6 Cowen, 677, it was held that the express exception of a mill site was impliedly an exception of so much land as is necessary for the mill pond, and for erecting and carrying on the business of a mill.

2. The next question is, whether the devise of the *land and mill, with the appurtenances, &c.*, shall carry the easement to the devisees; and it is very clear that it shall. The right to use the water in a certain way, though it be only convenient for a building, is an appurtenance, and shall pass by a grant of the building, *cum pertinentiis*. Thus, in *Nicholas v. Chamberlain*, Cro. Jac. 121, "It was held by all the court upon demurrer, that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the

Burr v. Mills.

house *with the appurtenances*, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house ; because it is necessary, *et quasi appendant thereto* ; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land ; and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house *with the appurtenances* to one, and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them." If such be the effect of a grant, *a fortiori* shall it be so of a devise. In *Whitney v. Olney*, 3 Mason, 280, a devise of a mill *with the appurtenances*, was held to carry all the land usually occupied with the mill, although land cannot be said in law to be appurtenant to land. And see several cases cited *id.* 282.

In the case at bar, the grantor and testator had occupied the premises for a *saw mill* from before the time of deeding till 1804, when the dam was carried away by a flood. He prepared to rebuild before his death. But the land finally coming to the defendant, he substituted a *grist mill*. This he had a right to do by the express terms of the reservation ; and of that right the plaintiff was fully aware when his deer skin mill was erected some fourteen years before the trial. His only hope, as he said, was from the disagreement of the devisees, the then owners.

The result of our opinion is that a new trial must be granted ; for although the defendant had a right to flow that portion of the premises which were granted by *Nathan Burr* to the plaintiff, he had no right to flow the other portion of the plaintiff's premises which were granted to him by *Nathaniel Burr*. The damages allowed by the jury for the flowing of the premises last mentioned must have been trifling compared with what probably were allowed for the injury to the plaintiff's mill, and the defendant therefore is entitled to a new trial.

New trial granted.

Troy Turnpike and R. R. Co. v. M'Chesney.

THE TROY TURNPIKE AND RAIL ROAD COMPANY vs.
M'CHESNEY.

The clause in an act of incorporation of a turnpike or rail road company authorizing a *forfeiture of stock and previous payments* in cases of non-payment of calls, confers a *cumulative remedy*; and does not deprive the company of the right to *proceed by action* for the recovery of subscriptions. Nor is the company limited to the remedy by forfeiture, although the promise be *expressed* in the subscription to be *upon pain of forfeiting, &c.*, and consequently the plaintiffs may declare upon such contract as upon an *absolute promise*.

A notice requiring payments to be made to A. B., residing in the city of Troy, is *prima facie* a sufficient compliance with the requirement of the statute that the *place* of payment shall be designated in the notice.

An *agent* of an incorporated company may receive authority to act for his *principals*, otherwise than by a formal resolution; it may be collected from circumstances.

THIS was an action of *assumpsit*, tried at the Rensselaer circuit, in October, 1835, before the Hon. JAMES VANDERPOEL, then one of the circuit judges.

The plaintiffs were incorporated in April, 1831, with power to make and construct a *turnpike road* from the city of Troy to Bennington or Pownal, in the state of Vermont; and also to make and construct a single or double *rail road* from Troy to either of the said towns. The *capital stock* to be \$100,000, to be divided into shares of \$100 each, with power to the company to increase the stock to \$1,000,000. Commissioners were appointed by the act to receive subscriptions, and when the sum of \$50,000 was subscribed, notice was directed to be given for the election of directors, who were authorized to require payments of the sums subscribed, at such times and in such proportions as they should see fit, under the penalty of the forfeiture of all previous payments made thereon; notice of the payments required, and of the time and place of payment, to be given in a public newspaper published in the city of Troy. The defendant subscribed for *five shares* of the stock, amounting to \$500, and this suit was brought against him for calls amounting to

 Troy Turnpike and R. R. Co. v. M'Chesney.

\$320, which he had neglected to pay. The plaintiffs produced *one of the books of subscription*, by which it appeared that the defendant was a subscriber for five shares of the stock of the company. The engagement was to the effect that the subscribers severally promised to pay to the company \$100 on each share of stock set opposite their respective names: one dollar to be paid immediately, and \$99 in such sums and at such times and places as the company should require, *upon pain of forfeiting to the company all previous payments made thereon*. The plaintiffs proved calls for payments, amounting in the whole to \$64 upon each share, and the publication of notices of such calls requiring payments to be made *to certain persons* named in the notices, *residing in the city of Troy*, in the city of New York, and in other places, or to one of them. Upon this evidence the plaintiffs rested, and the defendant's counsel moved for a *nonsuit*, on the grounds: 1. That by the terms of the subscription, the only remedy that the plaintiffs had was a *forfeiture* of previous payments; and 2. That the *places of payment* as designated in the notices were not sufficiently *definite*; which motion was overruled by the judge.

From the defence set up it appeared, that about 15th June, 1831, directors were appointed, and that up to January, 1833, it was contemplated to construct a *rail road* instead of a *turnpike road*; then, however, the idea of constructing a rail road was abandoned, and the directors resolved to construct a *Macadamized turnpike road*, and appointed committees to negotiate with the subscribers to the stock, and to allow them to withdraw *one-half* of their subscriptions upon their assuming to pay the residue as calls should be made. *After this*, to wit, in the early part of *March*, 1833, the defendant became a subscriber for the stock held by him. He complained that a number of the subscribers had been allowed to withdraw their subscriptions, contrary to his expectations; and also that the agent of the company who had solicited his subscription had promised to release him therefrom, if at any time he desired it, and he alleged that he had made such request. In reference to these allegations proof was adduced on both sides.

Troy Turnpike and R. R. Co. v M'Cheaney.

The judge charged the jury, that unless they were satisfied that the defendant was fully informed of all the circumstances of the transaction in reference to the road, and that no fraudulent representations were made to induce him to subscribe, they ought to find a verdict in his favor; otherwise, he instructed them, they should find for the plaintiffs the amount claimed. The jury found for the plaintiffs. In the progress of the trial it appeared that the *agent* of the company received *verbal instructions* from the directors to permit such subscribers as desired to do so, *wholly* to withdraw their subscriptions, and that such instructions were given without any *formal resolution* adopted by the directors and entered upon their minutes: this evidence was objected to by the defendant, and overruled by the judge. The defendant moved for a new trial.

H. Z. Hayner, for the defendant, insisted that a new trial ought to be granted: 1. Because the notice of the *place* where the payments were to be made was insufficient. The notice required the payment to be made *to A. B. of the city of Troy*; it should have been that the payment should be made *at Troy* to A. B. According to the notice the defendant could be relieved only by a *personal tender* to A. B. 2. There was a *variance* between the contract declared upon and that produced on the trial. As declared upon it was an absolute promise to pay, subjecting the promisor *to an action at law*, whereas by the contract produced the only remedy of the plaintiffs was a *forfeiture of previous payments*. 3. The undertaking of the defendant was *not* a note under the statute, and the plaintiffs were not entitled to recover for the omission to set forth any *consideration* for the promise. 4. A *verbal authority* to the agent to discharge such subscribers as chose to be discharged, was an illegal act; the directors could only act by a *formal resolution* entered upon their minutes.

H. T. Eddy, for the plaintiffs.

By the Court, NELSON, Ch. J: All the cases in this court from 1 Caines, 381, to 14 Johns. R. 238, show that the con-

Troy Turnpike and R. R. Co. v. M'Chesney.

dition of forfeiture of stock and all previous sums paid, for non-payment of any subsequent instalment, is but a cumulative remedy given to the company. See 19 Wendell, 43. The general act passed in 1807, 1 R. L. 228, 1 R. S. 580, relative to turnpike companies, as well as the act respecting incorporations for manufacturing purposes, passed in 1811, 1 R. L. 245, 3 R. S. 221, contain clauses nearly *verbatim* with the one in this charter, and under which several of the decisions were made.

It is true, the forfeiture clause is here carried into the subscription papers; if it had not been so embodied, the rights and liabilities of the subscriber would have depended upon, and must have been construed in reference to the act of incorporation of the company; and the effect of it would have been as available to him as if incorporated into his contract. I cannot think, therefore, that this circumstance varies the question. The most that can be said regarding the uniform construction of the clause is, that the instrument giving the remedy at common law contains also the one under the statute.

This view answers the objection of *variance* between the contract as set out and as proved. The plaintiffs had a right to count as upon an *absolute promise*.

The act of incorporation of this company, Statutes, sess. of 1831, p. 232, § 15, provides that notice shall be given, among other things, "of the place and time" when and where payments are to be made. The notices published designated the individuals by name, and the city or village in which they resided, to whom the payments were to be made. It is urged that the *place* is too indefinite. The notice was thirty days, and with ordinary diligence there could have been no great difficulty in finding the individual. At all events, I think if the failure of payment happened on this account, it lay upon the defendant to give some evidence of it.

It is also urged that the verbal authority given to the agent by the directors to negotiate with the subscribers, and relinquish even the *whole* of their stock if insisted upon, after the company had determined to build a Macadamized turnpike road instead of a rail road, was nugatory; not be-

Russell v. Butterfield.

ing a corporate act of the body. Such is undoubtedly the general rule, though the *appointment* of the agent, and the *extent of his authority*, may as in the case of an appointment by a natural person, be established by circumstances. 14 Johns. R. 118. 4 Cowen, 645. But the question is not at all important here; because, 1. The defendant was advised of the direction thus given in respect to the previous subscribers before he subscribed; and 2. Even if his position be correct, as to the agent in this case, the only consequence would be, that the subscribers are still liable, which cannot operate to his prejudice. If it be said the directors subsequently ratified the *act* erasing their names, the answer is, that they have done no more than the defendant was advised they intended to do.

Upon the whole, under the charge of the judge at the trial, and the verdict of the jury, I do not perceive that the defendant can complain either in law or equity.

New trial denied.

RUSSELL vs. BUTTERFIELD.

Where a mortgage of personal property given to secure the purchase money contains a clause that the property shall remain in the possession of the mortgagor until default in payment of the purchase money; but on the happening of such default, or in case the mortgagor attempt to remove or dispose of the property, giving the mortgagee the right to take possession of and sell it; the mortgagor is authorized upon the mortgagee removing the property from the county where the parties resided, to bring replevin to obtain possession thereof, although the time of payment of the mortgage moneys has not yet arrived.

The continuance of possession in the mortgagor in such case, does not per se render the mortgage void, provided it be duly filed. If fraudulent in fact, such fraud may be shown; but it is not constructively fraudulent.

If the mortgagor could be deemed entitled to recover as for the value of the property, all he would be entitled to, would be the value of his interest in the property deducting the amount of the debt due to the mortgagee; or if his interest had in fact ceased at the time of the assessment of the value, by the mortgage having become absolute, he would not be entitled to recover any thing except, perhaps, costs; and it seems, that

Russell v. Butterfield.

in this case, the rights of the parties as they existed at the commencement of the suit are not regarded.

In *trover* or *trespass*, if the property be taken by a *stranger*, the *special party man* may recover the *whole value*; holding the balance beyond his own interest in trust for the *general owner*; but if the suit be against the latter, he is entitled to a deduction of the *value of his interest*.

ERROR from the Onondaga common pleas. Russell brought an action of *replevin* in the *detinet*, against the defendant *Jefferson Butterfield*, and on the trial the following facts appeared: on the 23d March, 1835, Russell sold a horse, waggon and harness to *George W. Butterfield*, for the sum of \$90, and to secure the payment thereof, took a mortgage of the same property, with a defeazance therein expressed, that the same should be void on the payment of \$50 on the first day of *November* next after the date of the mortgage, and the further sum of \$40, in one year thereafter. The property to remain in the possession of the mortgagor, but in case of default of payment of the mortgage money or any part thereof, or in case of any attempt to remove or dispose of the property on the part of the mortgagor, the mortgagee to have a right to seize it, wherever it might be, and to sell and convert the same into money, and appropriate the proceeds to the payment of his debt, paying over the surplus, if any, to the mortgagor. The parties to the mortgage resided in the town of *Manlius*, in the clerk's office of which town the mortgage was filed on the 2d April, 1835. The mortgagor, who is a millwright, went to the town of *Fulton*, in the county of *Oswego*, to work and took the horse with him, where the horse was siezed under an *attachment*, sued out by one *Sumner Whitney*, upon which a judgment was obtained, an execution issued, the horse sold and bought in by *Whitney*, subject to the plaintiff's mortgage, at about four dollars, which, after deducting the charges of the keeping of the horse, yielded the plaintiff the net sum of sixty-nine cents. The horse was sold under the execution in July, 1835. In the month of *August* following, the plaintiff in this suit found him in the possession of *Jefferson Butterfield*, in the town of *Syracuse*, in the county of *Onondaga*,

Russet v. Butterfield.

and demanded that he be delivered to him. Jefferson Butterfield refused to comply, saying he had the horse of *Sumner Whitney*, and that Whitney was good to him for the same. The plaintiff sued out a *replevin*, in *August*, 1835, and the cause was tried in the Onondaga common pleas in February, 1836. The court decided that the facts proved did not show a forfeiture of the mortgage; that the action of the plaintiff was prematurely brought, and that the defendant was entitled to a verdict for *the value of the horse*; and the jury, under the direction of the court, found a verdict for the defendant, *finding the value of the horse* to be thirty-five dollars, for which sum and costs, judgment was rendered in favor of the defendant. The plaintiff having excepted to the decision of the court, sued out a writ of error.

H. C. Van Schaack, for plaintiff in error.

J. G. Forbes & D. A. Orcutt, for defendant in error.

By the Court, COWEN, J. The court clearly erred in deciding that the removal of the horse to *Oswego*, did not violate the provision in the mortgage. It was, in its own nature, calculated to hazard the plaintiff's security, and worked that effect. This was the very evil which the clause providing against a removal was intended to prevent.

It is now said the mortgage was fraudulent, by reason of the continued possession of the mortgagor. This is not necessarily so. The plaintiff never parted with his property absolutely. The sale and mortgage were one act, like saying, "I sell, but the sale shall not be absolute, unless the money be paid at such a time, and the goods be kept within my reach." A mortgage of this sort would be void unless filed, perhaps: but that now in question was filed. It might also be shown to be in fact fraudulent, but is not constructively so. The point of fraud was not even made below. Every body concerned, unless the defendant below be an exception, dealt with the horse as if he were bound to the plaintiff below by a valid mortgage.

Russell v. Butterfield.

Again, admitting the action to have been premature, it seems to me that the measure of damages prescribed by the court below was wrong. A man claiming under, and who certainly has no greater right than the mortgagor, was allowed to recover the full value of the horse, without any deduction on account of the incumbrance. The mortgagor was probably insolvent, and all personal remedy against him was out of the question.

The statute gives the defendant in replevin the election, when he succeeds and has title, to take judgment for a specific return of the property, or, waiving that, for the value of the property to be assessed by a jury. 2. R. S. 437, § 55, 2d ed. But it could never have been intended to give the defendant a value beyond what the goods would be worth, when returned to his hands. The object was to substitute the real value for the specific goods. The relation of the defendant below to the plaintiff was in the nature of that between bailor and bailee. The case is certainly not stronger than if the mortgagee had done the wrong without process, and had been sued in trover or trespass. It has long been held that, although if the property be taken by a stranger, the whole value may be recovered by the special property-man, he holding the balance beyond his own interest in trust for the general owner, yet, on a like suit between him and the general owner, the latter shall be entitled to a deduction of the value of his interest by the jury, when they come to the assessment of damages. The value of the plaintiff's interest is the worth of his special property in the article. Story on Bailm. 204, 5, § 303. *Heydon & Smith's case*, 13 Co. R. 69. *Lyle v. Barker*, 5 Bin. 460. It is said in Coke's R. to be the better opinion in 11 H. 4, 23, "that he who hath a special property in goods, shall have a general action of trespass against him who hath the general property, and, upon the evidence, *damages shall be mitigated*; but clearly the bailee or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover *all in damages*, because he is chargeable over." This distinction is cited and approved by Tilghman, Ch. J. in *Lyle v. Barker*. Then taking up

Russell v. Butterfield.

the relation which we have supposed to exist here; the pledgor sues the pledgee for a wrongful conversion. The latter is accountable, but the debt shall be recouped in damages. Story on Bailm. 236, 7, § 349. *Jarvis v. Rogers*, 15 Mass. R. 389. But this, it seems must be taken of a wrongful conversion, where there has been no tender by the pledgor; for, if he tender the debt, the pledgee shall be left to his remedy by demand and action for the money; and must account for the general value of the goods. On tender, the special property of the pledgee ceases, and he becomes a wrong doer, and is accountable as a stranger. *Ball v. Stanley*, 3 Yerg. 199, 201. It has been suggested that an act totally inconsistent with the bailment, *e. g.*, a tortious sale by the pledgee, would equally revest the absolute property in the bailor. *Samuel v. Morris*, 6 Carr. & Payne, 565. But the rule of damages was not mentioned. The full value would in some instances be unjust even where the action is in favor of the bailor; and, in most cases, where it is by the bailee. In the case of a pledge, the bailee who has wrongfully converted the property, still has a remedy by action for the debt and may therefore save himself, though compelled to pay the full value. But this is a circuitry which it is desirable to prevent; and it may be done by recoupment, where there is a privity between the parties. The question before us is, I think, the same as if the replevin had been brought against the immediate pledgor. Judgment for a return would have left the whole mortgage debt still due; but a verdict and judgment for the qualified value in the hands of the defendant, would have been an application of the residue, *pro tanto*, in discharge of the debt, which might have been shown by way of defence in an action against the mortgagor. *Forbes v. Parker*, 16 Pick. 462, will, I think, be found fully to sustain this view of the case.

The property of the defendant was temporary at best, and the cause was not brought to trial till after it had ceased, unless the first instalment had been paid. If it had not, then the defendant could not have had a return, *Lewis v. Train*, 4 Pick. 168, and the authorities there cited, and was not en-

Oakley v. Van Horn.

titled to the value for that reason. The statute gives value only where the defendant has the right to a return. The point, however, was not made; if it had been, payment or tender might have been shown in reply. Still the case cited and the statute are material to show that the law, in the judgment which it gives, keeps an eye on the nature of the defendant's property. In *Lewis v. Train*, the defendant's property having expired pending the suit, he could not take judgment for a return, though he was entitled to that when the action was brought; and several cases cited in that cause are to the same effect. This is obviously just. It is impossible to make the substitute provided by the statute equally so, unless in assessing the value we maintain the principle, by giving general value where the avowants' property is absolute; a qualified value where it is special; and only costs, as in *Lewis v. Train*, where it has ceased.

The judgment is reversed; a *venire de novo* to go from the court below; the costs to abide the event.

OAKLEY vs. VAN HORN.

A justice's judgment will not be reversed for the omission of the justice to call the plaintiff before receiving the verdict, if he be in fact present when the verdict is received, and does not submit to a nonsuit.

Nor will it be reversed because costs are taxed over five dollars; the court will intend that there were foreign witnesses which increased the costs, or that the party was entitled to double costs.

A court of common pleas have no power to reverse a justice's judgment on the ground that the verdict was against the weight of evidence.

A collector of a school district, who makes a levy previous to a demand of the tax assessed, is liable to an action of trespass; but a justice's judgment in favor of the collector will not be reversed merely because it does not appear from the justice's return that the fact was proved that such demand was made previous to the levy; where the return is silent as to the proof or any objection to its omission, the legal intendment is that the proof was given or waived.

ERROR from the Delaware C. P. Van Horn sued Oakley in a justice's court in trespass, for levying upon and selling a saddle for a school tax. Oakley justified as collector

Oakley v. Van Horn.

of school district No. 10, [Roxbury,] under a warrant regular on its face. The plaintiff claimed to live in the adjoining district No. 11, the line between which and No. 10 divided his farm. The proof was strong that he resided in No. 11, but there was proof that he resided in No. 10. His residence was within a very few rods of the line. The cause was tried by a jury, who found for the defendant. The common pleas of Delaware, on certiorari, reversed the justice's judgment. The return to that court showed enough to make out the defence affirmatively, provided the plaintiff was a resident of No. 10, except that it did not appear that any evidence was given to show that before the levy the collector *demande*d the payment of the tax, according to 1 R. S. 478, § 48, 2d ed., nor on the other hand did it appear that the absence of such proof was objected to or in any way noticed upon the trial. On the return of the jury into court before the justice, the plaintiff was *present* but was *not called* by the justice, who rendered judgment for the defendant, with \$6 42 costs. Oakley sued out a writ of error.

L. Monson, for plaintiff in error.

A. J. Parker, for defendant in error.

By the Court, COWEN, J. The statute, 2 R. S. 175, § 110, 2d ed. requires that previous to receiving the verdict, "the justice shall call the plaintiff. If he be absent, and no one appear for him, the verdict shall not be received." The statute is merely directory in respect to the ceremony of calling the plaintiff. The object is to ascertain whether he be present; and it is enough that he be *actually present*, and not objecting. *Non constat* that he was desirous to have a nonsuit entered. If otherwise, he might have said so, or have actually withdrawn, as in *Platt v. Storer*, 5 Johns. R. 346.

As to the costs being over five dollars, there may have been foreign witnesses. 2 R. S. 177, § 127. That we must intend, nothing appearing to the contrary; in which case, by the section cited, more than five dollars may be

Oakley v. Van Horn.

given. Beside, the defendant before the justice being sued for an official act, was entitled to once and a half his costs. 2 R. S. 612, § 25, 2d ed. That may and probably did, in this instance carry the amount to \$6 45.

The court of C. P., in reversing the justice's judgment, took for one ground that the jury found against evidence. I think they erred in this respect, according to the case of *Stryker v. Bergen*, 15 Wendell, 490; and if there was no other ground for reversal presented by the return, the justice's judgment must be affirmed, according to *Noyes v. Hewitt*, 18 id. 141. The jury had evidence before them tending to show that Van Horn resided in No. 10. I admit the evidence against his residence there, was very strong and decidedly preponderant. But the common pleas do not sit to grant a new trial on the weight of evidence. They act as a court of error, and can only decide the law upon uncontradicted facts appearing in the return, and upon points of law properly raised on those facts. Accordingly, if we are authorized to hold from the return that no demand was made of the tax in question previous to a levy, pursuant to 1 R. S. 478, § 98, 2d ed., and that the point was duly raised in the justice's court, there was error within the rule laid down in *Jackson ex dem. Cook v. Shepard*, 7 Cowen, 88. This was another ground of reversal by the C. P. But in the case at bar, the return is merely silent as to the proof of demand. No objection appears to have been made on that account, as was done in *Jackson v. Shepard*, nor does it appear affirmatively that the proof was wanting. I think we must intend, therefore, that it was given. Even on a judgment by default, where no evidence was returned, this court intended it was sufficient, the contrary not appearing. *Wilson v. Fenner*, 3 Johns. R. 439. The case cited recognizes the doctrine of the common law, which has been often repeated, that the judgment of an inferior court is sustainable if it appear to be regular after jurisdiction obtained, without its showing any evidence in particular. It is enough to say, "after hearing the proofs and allegations of the parties." The certiorari at the common law did not reach the evidence any more than a writ

 Oakley v. Van Horn.

of error. *Birdsall v. Phillips*, 17 Wendell, 464, and the cases there cited. *Rathbun v. Sawyer*, 15 id. 451. In order to bring error, the points of law on the evidence are raised by a bill of exceptions which was given by statute; and to attain a like object in respect to the justice's court, an affidavit stating the facts and points of law must be made, to the allegations of which the justice is to return, admitting or denying them. *People, ex rel. Roe, v. Suffolk C. P.*, 18 Wendell, 550. Had the objection now raised come before us on a bill of exceptions, it must have been shown affirmatively that the collector failed to justify, by proving a demand before he levied; and beside: that the defect was mentioned as an objection; for it is one which may be supplied, and we would intend that had the objection been raised, it would have been obviated by proof of the fact. Here the parties were present, with every opportunity to raise the point. It has been held in a late case, on a certiorari, that an omission to object will even authorize this court to infer a fact necessary to confer jurisdiction. *Baldwin v. Calkins*, 10 Wendell, 167, 174. So far, at least, as the merits are concerned, the court of error are expressly required by the statute to "proceed and give judgment in the cause as the right of the matter may appear," &c. 2 R. S. 185, § 181, 2d ed. Is it right that a party should be received on certiorari to make an objection which he would not hazard in the court below, perhaps for the very fear of its being met? That is not so held in any other court of error and the rules of intendment have always been most strongly applied to sustain the judgment in cases of certiorari to a justice.

The judgment of the C. P. should be reversed, and that of the justice affirmed.

Judgment accordingly.

END OF MAY TERM.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN JULY TERM, 1839, IN THE SIXTY-FOURTH YEAR OF THE INDEPENDENCE OF THE
UNITED STATES.

THE PEOPLE vs. SMITH DAVIS.

On an indictment here against a prisoner for *having in his possession, with intent to pass, bank notes*, purporting to have been issued by a banking corporation of a state *other than that of New York*, it is not necessary to show that there is in fact such a corporation in existence; at all events, proof of the most general character of its existence is sufficient.

Where the *direct charge* rests for its proof upon the testimony of *accomplices*, such proof is sufficient to convict, if it be *corroborated by the evidence of credible witnesses*, although such evidence has only an *indirect tendency* to establish the commission of the *particular offence* charged: as where the testimony of the accomplices fixes upon the prisoner the charge of having in his possession counterfeit bills with the intent to pass, and the proof by the unimpeached witnesses shows that the prisoner was possessed of a *press and plates* used in making counterfeit impressions of bank bills. The confirmation of the accomplices must, however, be of some fact or facts which go to fix the guilt of the accused.

A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be permitted to testify that *he would believe him on his oath*.

INDICTMENT for having *in possession counterfeit bank bills with intent, &c.* The prisoner was indicted for that he on,

The People v. Davis.

&c., at, &c., feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called the Morris Canal and Banking Company, duly authorized for that purpose by the laws of the State of New Jersey, which said last mentioned false, forged and counterfeited negotiable promissory note for the payment of money is as follows, that is to say: (setting forth, *verbatim et literatim*, a bank bill purporting on its face to be a five dollar bill of the Morris Canal and Banking Company, dated at their bank at Jersey City; and then proceeding as follows :) with intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud, &c., he the said Smith Davis then and there well knowing the said note to be false, forged and counterfeited, against the form of the statute, &c.

The trial of the prisoner come on in the New York general sessions in February, 1839. 'The fact of his having *counterfeit bills of the Morris Canal and Banking Company in his possession* with the intent to pass them was proved by several of his accomplices, whose testimony was corroborated by the evidence of unimpeached witnesses, that the prisoner had the control of a *press and plates used in making counterfeit impressions of bank bills*. A bill of the Morris Canal and Banking Company was produced in evidence which had been received from the prisoner, and passed by one of his accomplices, which was proved to be counterfeit. The counsel for the prisoner requested the *recorder*, who presided at the trial, 'to charge the jury: 1. That the averment of the fact that the Morris Canal Company was *a company duly authorized by the laws of the state of New Jersey*, must be proved as a matter of fact by legal evidence of the act of incorporation; and that such proof not having been given, the prisoner was entitled to acquittal; and 2. That the corroboration of an accomplice must be as to some fact or facts, the truth or falsehood of which

The People v. Davis.

go to prove or disprove *the direct charge* against the prisoner ; that the corroboration of an accomplice by one or more other accomplices, is not such a corroboration as the law requires ; and that the same rules as to the corroboration of the accomplices, apply to the *collateral facts* intended to prove the *scienter* ; in respect to which points the recorder instructed the jury ; 1. That it was *not necessary* that the prosecution *should produce and prove the charter of the Morris Canal Company* ; that it was enough that proof should be given to satisfy them of the existence of such an institution ; and 2. That the witnesses who were accomplices of the prisoner were not to be believed, unless corroborated by other witnesses who the jury did believe, in facts connecting the prisoner with the possession or with the manufacture of the forged bills of the Morris Canal Company. To which charge the counsel for the prisoner excepted. Besides the above, there was another question of law raised at the trial, and passed upon by the court : a witness called on the part of the prosecution having been impeached, the public prosecutor called a witness to sustain his character, who testified that he had known the impeached witness for 12 or 15 years, but that he was not acquainted with his general character for truth and veracity. The public prosecutor then put this question to him : "Have you ever heard R. D.'s character for truth and veracity questioned ?" which was objected to by the prisoner's counsel. The court overruled the objection, saying that such question was proper, followed up by the inquiry whether the witness under examination would believe the other witness when testifying on oath. To this decision also an exception was taken. The witness then testified that he never heard his character for truth and veracity questioned, except in one instance ; that he knew with whom he associated ; that he never heard his character for truth and veracity spoken of, and that he would believe him on his oath. The prisoner was convicted, and the case was brought before this court upon *certiorari*, bringing up the indictment and bill of exceptions. The case was argued by :

The People v. Davis

D. Graham and D. Graham, jun. for the prisoner.

J. R. Whiting, for the people.

By the Court, NELSON, Ch. J. The most important question arising in this case is, whether the people were bound to prove by the highest evidence, the legal existence of the *Morris Canal and Banking Company*.

It is conceded to have been unnecessary under the old act, 1 R. L. 405, § 9, but it is insisted that the revised statutes have changed the rule. The former provided, that if any person shall have in his possession any forged or counterfeited *promissory note for the payment of money*, with the intent to pass it and to defraud, knowing the same to be counterfeit, he shall be deemed guilty of felony. *Bank notes* fell under the general description, and became the subject of this offence. The revised statutes have distinguished them from other instruments of the kind, by increasing the degree of punishment annexed; but this is the only object, or, as I apprehend, effect, of the change. To accomplish it, a separate section became necessary in order to describe the paper thus singled out; the substance of which is as follows, 2 R. S. 674, § 36: Every person having in his possession any forged or counterfeit negotiable note, bill, draft, or other evidence of debt "*issued or purporting to have been issued by any corporation or company duly authorized by the laws of the United States, or of this state, or of any other state, government or country,*" &c., with intention to pass it, &c., shall be subject to the punishment prescribed for forgery in the *second* degree. The next section reduces the like offence in respect to all other paper, to forgery in the *fourth* degree, specially excepting bank notes.

The language used to describe the bank paper in the 36th section, is now seized upon as indicating an intent to require legal proof of the existence of the company. We do not so understand it. Even if the terms required *proof of authority* in the company to issue the notes, construing the phrase *purporting to have been issued by a bank lawfully*

The People v. Davis.

authorized for that purpose, in its strictest sense, still the *kind or degree of proof* is not prescribed; and the fact is left to be proved in the ordinary way, under which, as heretofore practised in like cases, the best evidence that might be furnished is not required. This is too well understood to make a reference to authorities necessary.

Under the old law, the *existence of the company*, as well as the genuine or counterfeit *signature* of the officers, (as the case might be,) was frequently involved in the issue; and it must have been so in cases of altered notes; and yet *secondary evidence*, such as the acts and operation of the institution and the like, have been invariably received at theoyer and terminer.

But after full consideration we are disposed to construe the section (36th) as not necessarily requiring the existence of a corporation, or association, from which the counterfeit bill or note *purports* to have been issued, in order to bring the case within it; it is sufficient if the bill *purports on its face* to have been issued by an authorized company; the terms "*purporting*," in the section, being intended by the legislature to qualify the whole of the succeeding clause. It is well settled that the fact of the *person* being fictitious, by whom the note purports to have been made, does not vary the nature of the offence. See *The People v. Stearns*, *post*, decided in this term, and the cases there collected. And the same rule of course applies to *corporations*. The section was obviously framed upon this view of the law, and with a design not to interfere with it. The counts upon which the prisoner was convicted, are properly framed under this view of the act.

It was urged at the trial and again here, that the corroboration of an accomplice, to be effectual, must be in respect to some fact, the truth or falsehood of which goes to prove or disprove directly the offence charged upon the prisoner; and that the corroboration of an accomplice, by one or more accomplices, is not the confirmation the law requires. The court advised the jury that the witnesses who were accomplices of the prisoner, were not to be believed by them *unless confirmed by other credible witnesses in respect to the*

The People v. Davis.

facts connecting the prisoner with the possession of the forged bills, or with the manufacture of them. Mr. Justice Alderson, in summing up in the case of *Rex v. Wilkes and Edwards*, 7 Carr. & Payne, 272, observed, "that the confirmation he always advised juries to require was, a confirmation of the accomplice in some fact which went to fix the guilt on the particular person charged." See also 6 Carr. & Payne, 388, 595. Every part of the testimony need not be confirmed; and the question usually is, whether the jury will believe the witness in such parts of his narrative as the confirmation does not extend to. 2 Russ. 600, and the cases there cited. It appears to me, that the instructions given on this point were as favorable to the prisoner as the most liberal cases on the subject recommend; certainly more so than can be exacted of the court by the settled rules of evidence. 2 Campb. 133, and the cases before referred to. Within these rules, the jury might have been advised that if they believed the accomplices, they were bound to convict; though I concede, in the exercise of a sound discretion, the court should usually recommend the propriety of confirmatory evidence, and a discreet jury will generally require it. Here the facts which the court advised should be confirmed by other credible witnesses before a conviction could be justified, tended directly to fix upon the prisoner the offence. His possession of the forged bills of the bank, or the actual forging of them, (the fact to be confirmed, as charged,) if not of the essence, went to the point of the offence, and, if believed, pressed very strongly against him, and laid a foundation for giving credit to the narrative of his associates.

The counsel for the prisoner seemed to suppose that the confirmation should extend to the *possession or uttering of the particular bills* counted on: and that the court erred in not so instructing the jury. This is too technical an application of the rule. The *guilty possession* of the money, (the counts relied on by the district attorney,) does not depend so much upon proof of the possession of the particular bill contained in the indictment, as upon the fact of a large *amount of bills* being found or proved upon him of like

The People v. Davis.

character, with the attending circumstances. Proof or confirmation of such facts and circumstances also naturally tends to strengthen feebler evidence of the possession of the particular bill; and may well be put forth in that aspect. The same view applies, with diminished force, perhaps, to the charge of *uttering*. The possession of a large amount of like counterfeit paper, or counterfeit paper of other descriptions, shows the guilty knowledge and a preparation to commit the offence; and would tend to confirm other testimony as to the *uttering* of the particular bill.

It is farther urged, that the court erred in permitting the question to be put to a witness called to sustain the credit of another, whether, *he would believe him on oath*, after an admission that he had never heard his character for truth and veracity spoken of, but who had previously answered that he knew the witness and the persons with whom he associated. I am of opinion the question was properly admitted. If such a question was not permitted, the most respectable man in the community might fail in being supported if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet, undoubtedly, be competent to sustain him. The question is accurately and comprehensively stated by Mr. *Phillipps*, in his treatise on the law of evidence, vol. 1, p. 212, ch. 8. The regular mode, he observes, is to inquire whether they have the means of knowing the former witness' general character, and whether from such knowledge, they would believe him on his oath. Other modes are also proper, and which point the question directly to character for truth and veracity. Mr. *Starkie* goes still further, and expresses the opinion that the proper question is, whether he (witness) would believe him upon his oath, leaving to the cross-examination to bring out the grounds of the belief. 4 Carr. & Payne, 392. The answer to the previous questions in the case before us, fairly imported competent means of knowing the character of the witness

In the matter of Brown

to be supported, to bring it within the spirit of Mr. Phillipps' rule.

Several other minor objections were taken by the counsel for the prisoner, in the course of the trial, which it is not necessary to notice at large. We have examined all of them, and are satisfied they are not well founded.

Proceedings remitted.

In the matter of JOHN BROWN and HUGH BROWN,
non-resident debtors.

Under the act relative to *absconding, concealed and non-resident debtors*, proceedings may be had by the trustees of one non-resident debtor for the collection of a debt due from another non-resident debtor.

So a *non-resident creditor* may institute proceedings under this act against a *non-resident debtor*, where the debt is due on a contract made within this state.

It is enough that the affidavits of the two witnesses, required by the statute to be presented on the application for an attachment, state that the debtor is a *non-resident*, or that being an inhabitant he has *secretly departed* from the state, or keeps himself *concealed* with intent to avoid the service of civil process; it is not necessary that these affidavits should contain any thing as to the *nature of the debt*, or the residence of the creditor.

It is a rule of construction, that a mere change of phraseology in a revision of the statutes, will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature.

CERTIORARI to the Hon. *Thomas J. Oakley*, one of the justices of the superior court of the city of New York, to remove into this court, proceedings had before him against *John Brown* and *Hugh Brown*, as *non-resident debtors*. By the return it appears that on the 5th March, 1838, *Thomas Dewey*, *Thomas C. Doremus* and *Francis Griffin*, of the city of New York, trustees of the estate of J. & A., *non-resident debtors*, made application in writing to the judge, for an attachment against the estate of *John* and *Hugh Brown*, who were stated to be residents of *Ireland*, in the kingdom of Great Britain. The applicants stated that as such trustees, they had a demand against the *Browns* for \$7930 62, arising upon contracts made within this state.

 In the matter of Brown.

These facts were verified by the affidavit of the applicants, which concluded with these words—"The grounds upon which the above written application is made are, that the said John Brown and Hugh Brown reside out of the state of New York." To this was added the affidavit of two persons, who swore, that neither of them was interested in the application, and "that the said John Brown and Hugh Brown reside out of the state of New York." Upon these papers the judge issued a warrant of attachment, and directed notice to be given pursuant to law.

J. N. Taylor & S. Sherwood, on behalf of the debtors, made two objections: 1. That the trustees of non-resident debtors are not entitled to this remedy; and 2. That the affidavit of the two witnesses does not state all the necessary facts: that it should have been added, that the Browns were indebted, either on a contract made within this state, or to a creditor residing within this state. 2 R. S. 3, § 1, 5.

S. A. Foot, for attaching creditors.

By the Court, BRONSON, J. The trustees of a non-resident debtor are *vested by law* with all the estate, real and personal, of the debtor; and they have power to *sue in their own names*, or otherwise, and recover all the estate, debts, and things in action, belonging or due to the debtor. 2 R. S. 41, § 6, 7. I think the trustees are creditors within the meaning of the statute, and that they may proceed by attachment as well as in the more usual forms for enforcing legal demands. If they are creditors, we need not inquire whether they come within the description of "personal representatives," mentioned in the third section of the statute. 2 R. S. 3.

It was said, that these trustees represent a non-resident, and that a non-resident creditor cannot proceed by attachment against a non-resident debtor. There are two answers to this: The first has been given already. The trustees, being assignees by law of the debt, with power to sue in their own names, are to be regarded as creditors within

In the matter of Brown.

this statute; and then this is a case of *resident* creditors, proceeding against non-resident debtors. The second answer is, that a non-resident creditor may proceed by attachment, where, as in this case, the debt arose on a contract made within this state. 2. R. S. 3, § 1, 3.

Is it enough that the two witnesses prove the non-residence of the debtor, or must they prove more? An attachment may issue against a *non-resident*, when he is indebted, either on a contract made, or to a creditor residing within this state. And it may also issue against a *resident* debtor, who shall secretly depart from, or keep himself concealed within this state, with intent to defraud his creditors, or to avoid the service of civil process. § 1. After declaring by whom and in what manner application for the attachment shall be made and verified, the 5th section provides, that "the facts and circumstances to establish *the grounds* on which such application is made, shall also be verified by the affidavits of two disinterested witnesses." It is said that "the grounds" on which the application is made must include every thing which goes to make out a title to the process; but I think the words were used by the legislature in a more restricted sense, and that the two witnesses need say nothing about the debt or the residence of the creditor.

Application for an attachment may be made by any creditor, either in or out of the state, having a demand against the debtor of a particular description and amount. It must be made in writing, verified by the affidavit of the creditor, in which must be specified the amount of the debt, "*and the grounds upon which the application is founded.*" § 3, 4. "The grounds" here, evidently point to something other than the debt, or the residence of the creditor. Those are matters to be stated by the applicant, and to which he is to add "the grounds upon which the application is founded." This expression applies to the *debtor*—"the grounds" for proceeding against *him* must be specified. It must appear either that he is a non-resident, or else, that being a resident, he has secretly departed, &c. This is the only part of the case which need be verified by the affidavits of two disinterested witnesses. § 5.

 Howard v. Thompson.

A reference to the old law will tend to confirm this construction. By the former statute, the cases of resident and non-resident debtors were provided for in different sections, and in neither case were the two witnesses required to prove any thing concerning the debt or the residence of the creditor. When the proceeding was against a non-resident, the creditor was only required to prove by the witnesses the single fact that the debtor resided out of this state. 1 R. L. 157, § 1, 23. In re-enacting these provisions, with some additions, *Matter of Hollingshead*, 6 Wendell, 553, I think the legislature did not intend to change the rule as to what facts must be proved by the witnesses. If the proceeding be against a non-resident, the two witnesses must prove the fact of his non-residence; if against a resident, they must prove the fact that he has secretly departed, or keeps concealed, with intent, &c. The fact that there is such a debt and such a creditor as the statute specifies, may be established by other evidence. A mere change of phraseology in a revision of the statutes, will not alter the law, unless it evidently appear that such was the intention of the legislature. *Yates' case*, 4 Johns. R. 359.

The proceedings should be affirmed, and for the purpose of completion, should be remitted to the judge who issued the warrant. 2 R. S. 14, § 70.

Ordered accordingly.

 HOWARD vs. THOMPSON. S.C.

An action on the case for a *libel* lies against a party making a *communication* in writing to the head of a department of the government charging a subordinate officer of such department with *peculation* and *fraud* of various kinds, where such subordinate officer is subject to removal by the officer to whom the communication is addressed; but such action, though *in form* for a *libel*, is in the nature of an action for a *malicious prosecution*, and the proof to sustain it must be the same as is required in the latter action, i. e. the plaintiff is bound to show both *malice* and a *want of probable cause*.

Where the conduct of a public officer, against whom complaint is made, be such as with the attendant circumstances to excite the honest suspicion of a citizen that the officer is chargeable with a want of fidelity to the

Howard v. Thompson.

trusts reposed in him, or with fraud as it respects the government, and an action is brought against a citizen for a representation made by him respecting such officer, the question of *probable cause* should be submitted to the jury.

Even after a *notice of justification*, the proof of which is abandoned on the trial, the defendant may, in an action like this, rest his defence upon the ground of *probable cause*; he is precluded from doing so, under such circumstances, only where *probable cause* is more matter of *mitigation*.

THIS was an action for *libels* published by the defendant, of and concerning the plaintiff and his official conduct as a public officer, tried at the New York circuit in November, 1837, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The *libels* consisted of three letters written by the defendant, addressed to Levi Woodbury, secretary of the treasury of the United States, in the months of June and July, 1836. The plaintiff had for several years been employed in the custom house department at Staten Island, first as a *boarding officer* then as *store keeper* and afterwards as an *inspector*, which two latter offices he held at the time of the writing of the letters. The parties resided at Tompkinsville on Staten Island, where the defendant held the office of *post master*. The substance of the letters is, that the plaintiff and others had been guilty of *extensive frauds* committed upon the revenue; that the plaintiff, six years before writing the letters, was very poor, that he lived extravagantly, and had built a splendid mansion worth about \$10,000, adding that "four dollars per day cannot do such wonders;" and that he would prove that the frame in the plaintiff's building was taken from timber removed from the public store in 1832, and was worth \$200; and repeatedly suggests the propriety of having the plaintiff's property attached, and a suitable person appointed to make investigations. The defendant pleaded *non cul.*, and gave *notice of justification*, enumerating a great variety of cases of the grossest fraud and speculation of which he alleged that the plaintiff had been guilty, and which he would prove on the trial. On the trial of the cause, the letters were produced and read in evidence, when the counsel for the defendant announced that they *disclaimed* all intention to justify the charges contained

Howard v. Thompson.

in the letters, and in the notice of justification. It appeared in evidence, that in the winter of 1836, the plaintiff and others sought the *removal* of the defendant from his place *as post-master*, but did not succeed. A witness for the plaintiff testified, that at the time of the service of the *capias* in this cause, the defendant said "that if Howard had let him alone, he would have let Howard alone." The plaintiff, after giving some evidence to rebut the inference of probable cause, rested and the counsel for the defendant moved for a *non-suit*, on the ground that the letters in question should be deemed *privileged communications*, and that therefore the plaintiff could not recover unless the charges were made *without probable cause* and *maliciously*; that malice must be proved, independent of the letters themselves, and that no proof of malice had been given. The judge decided that sufficient evidence of express malice had been given to submit the case to the jury, and therefore refused to grant the motion.

The counsel for the defendant then, for the purpose of *rebutting the charge of malice* and *to show probable cause* for the communications made to the secretary of the treasury, called several witnesses; the first of whom proved, that in 1832 a public store belonging to the government was taken down, and another repaired in 1834; that the plaintiff subsequently built a large house, and erected other buildings upon his own property; that thirty or forty loads of timber were carted from the public grounds to the plaintiff's premises; and that a portion of the timber thus taken, worth at least \$200, was used in the erection of the plaintiff's buildings. This witness testified that he communicated these facts to the defendant in February or March, 1836, and observed to him that the subject ought to be investigated. It was testified that the timber taken from the public stores was worth from *four* to *six* hundred dollars, and that there had not been a public sale thereof. The deputy sheriff who served the *capias*, and another person present at the time of the service thereof, testified that they did not hear the defendant use the expressions, "that if Howard had let him alone, he would have let Howard alone; but

Howard v. Thompson.

the witness who had testified to those declarations being recalled, reiterated his testimony, saying that he had on the day it occurred made a memorandum of the language of the defendant, so as to be certain of what was said. To countervail this testimony given by the defendant, it was proved that the plaintiff built a *bathing house* and a *wood house* on the public grounds for the convenience of the establishment at Staten Island, in the erection of which he expended probably \$300, from his own pocket. *Samuel Swartwout*, the collector, testified, that though there was no absolute necessity for those buildings, they were highly convenient; that he saw the old timber taken out of the public stores; it was decayed, and he told the plaintiff to take it and remunerate himself out of it for the expense he had incurred, and to give the rest away *to the poor* for fuel, if it could not be used for the public works. It further appeared that the timber used by the plaintiff was *openly* and *publicly* taken and used: one witness stated that its value did not exceed *sixty-three dollars*, and another, that its value was not equal to the amount advanced by the plaintiff from his own pocket in the erection of the bathing house and wood house. The judge charged the jury that there was no proof to warrant the conclusion that the defendant had *probable cause* for making the charge imputed to him; and if they were satisfied that he had made the charge, that it was *untrue*, and that the defendant was actuated by *express malice*, they must find a verdict for the plaintiff. The jury found for the plaintiff, with \$3000 damages. The defendant asks for a new trial.

D. Lord, jun. & J. W. Gerard, for the defendant.

H. Nicoll, for the plaintiff.

By the Court, COWEN, J. This is an action in which the plaintiff, Howard, complains, that while he held the office of inspector of the customs and keeper of the public stores of the United States, the defendant falsely libelled him by addressing certain letters to the secretary of the

Howard v. Thompson.

treasury, charging and offering to prove that the plaintiff had been guilty of fraud in the execution of his trust as such keeper; specifying particularly the conversion of timber belonging to the United States in 1832. The secretary of the treasury was the officer who had legal cognizance of the complaint, and the power of removing the plaintiff on its being substantiated. For some reason, however, the investigation, which we must presume was duly made, proved so unsatisfactory to the secretary, that he thought it his duty to deliver up the letters to the plaintiff; and they were used by him as evidence to the jury. The defendant had given notice with his plea, that he would prove the truth of his charge in bar; and seems to have entertained the confidence of being able to do it, till, on the trial, he became so doubtful of success in convincing the jury, that on the plaintiff's resting, he avowedly abandoned the attempt, and staked his defence: 1. upon the unwarrantable nature of the prosecution, and 2. on evidence that, though he might have been mistaken, yet the circumstances were such as to have afforded at least *probable cause* for the representations he had made. The first ground was presented in the form of a motion for a *non-suit*, insisting that the plaintiff must, as in the ordinary case of a malicious prosecution, show a want of probable cause. The judge thought otherwise, holding that the proof given of the defendant's ill will towards the plaintiff was enough to carry the cause to the jury. This presents the first question which we are called upon to examine. Does a complaint addressed by a citizen to the proper tribunal against another, from motives of ill will towards the latter, subject the complainant to an action of slander, as for a libel, unless it be apparent that it was without probable cause? It may be put still more shortly; is it subject to be prosecuted as a libel? Must it not be pursued as a malicious prosecution or complaint?

This is not precisely like the case of a written communication between private persons, concerning their own affairs, nor was it addressed to a man or a set of men chosen by a voluntary society, a bishop or presbytery for example, and having, by common consent among the members, a power

Howard v. Thompson.

to redress grievances. It is therefore not necessary to inquire whether, in such instances, an action for a libel may not be brought in the common form. It has generally been so brought; and, though the communication has been deemed *prima facie* privileged, yet I believe where ill will towards the plaintiff has appeared, or motives of interest, and the defendant has failed in proving at least probable cause, the action has generally been sustained. The rule in respect to such mere private communications seems to have been laid down very sensibly by Mr. Justice J. Parke, in *Cockayne v. Hodgkisson*, 5 Carr. & Payne, 543. The defendant had made representations by letter to Lord Anglesey against his game keeper. In an action by the latter, the defendant failed to prove the truth, relying on the good faith with which he made the communication. The judge left it to the jury, mainly on the letter itself, whether it was such as a man would write merely wishing to put Lord Anglesey on his guard, and cause him to institute an inquiry; or whether the defendant was actuated by malice, and wished to supplant the plaintiff. In the former case, he said the defendant was entitled to a verdict; in the latter, the plaintiff. This too was after very clear proof that the defendant *had been told the stories* which he had written to Lord Anglesey, and seems to have had probable cause. He had also been requested by Lord Anglesey to give him information of any thing wrong. The letter was put on the naked footing of a libel; for it was said the defendant could not prove its truth without a plea of justification; which is clearly otherwise where an action is brought for a malicious prosecution.

The principle of the case cited and a number of others which preceded it, is very obvious. The private business of society could not be conducted without the liberty of speaking and writing in the honest pursuit of its purposes, even though, under other circumstances, the words would be slanderous; and though all that is said be a mistake, yet the words shall not, for that reason alone, be actionable. The distinction was a good deal considered in *Bromage v. Prosser*, 4 Barn. & Cress. 247, where it was allowed in a case of oral slander. And see Holt on Libels, 197, also *De-*

Howard v. Thompson.

lany v. Jones, 4 Esp. R. 191. But actual ill will towards the plaintiff may raise a presumption in the mind of the jury, that the appearance of a lawful purpose was assumed in order to injure him. When they are brought to believe this, it is their duty to find that the defendant acted in fraud of the law, which gives the privilege, and award damages against him. Whenever the communication is, for this or any other cause, taken out of the protective rule, the law acts upon it directly as a slander.

The rule is known to be different where the communication made or caused, is in itself the institution of a *judicial inquiry*. There, if it be apparently pertinent, it is absolutely exempt from the legal imputation of *slander*; and the party injured is turned round to a different remedy, an action for *malicious prosecution*; wherein he is bound to prove in the first instance, not merely that the communication was made in bad faith; but that it was not countenanced by probable cause. Such is the familiar instance of a criminal complaint addressed to a judicial magistrate or a grand jury, which results in a warrant or an indictment. 1 Curzon's Hawk. 554. The same thing may be said of any other definite or specific step in the progress of the cause; as the presentment of the bill in open court by the grand jury, *id.* or the publication of it by the clerk or prosecuting attorney upon arraignment. And yet many things may occur incidentally in the course of the cause, which would subject the speaker to an action of slander. Such are slanderous words spoken untruly and impertinently by witnesses, or by counsel, *Ring v. Wheeler*, 7 Cowen, 725. Such words communicated in writing would be the subject of an action, as a libel. The ordinary prosecutor of an indictment may doubtless make himself liable in an action of slander in the same way, by what he may incidentally say of the case. Serjeant Hawkins lays down the rule of exemption, as it stands upon the cases in respect to the definite proceedings in a cause, without any qualification. But he throws out the idea upon his own authority, that a malicious prosecution may subject the guilty participants in it to an action, as for a libel. Hawk. P. C. B. 1, ch. 28, § 8.

Howard v. Thompson.

He does not, however, pretend to be countenanced by authority; and it would be very difficult to apply the suggestion even to the prosecutor of an indictment any more than to the ministers of justice. See *per* Best, J. in *Fairman v. Ives*, 5 Barn. & Ald. 648. Sound policy would seem to exempt the prosecutor, to the same extent as the grand jury. Either is liable to an action for corruptly procuring an indictment; but to treat it directly as a libel, would be quite as effectual in discouraging due inquiries concerning crime, when applied to the former, as to the latter. The law therefore, seems to require in such case, a remedy more specific in form, and calling for more evidence to sustain it; than it receives as sufficient in an action for an ordinary libel.

Another class of writings has, in practice, been pursued as *libels*. These are such as contain false and scandalous matter, addressed to executive; administrative or other officers, entrusted with the power of appointment to or removal from inferior offices; and seeking either to prevent appointments or promote removals, on charges importing want of integrity, or other causes of unfitness. Such was a petition to the council of appointment, praying the removal of a district attorney, *Thorn v. Blanchard*, 5 Johns. R. 508; a deposition made with the view of presenting it to the governor of Pennsylvania, containing charges against a justice of the peace, *Gray v. Pentland*, 2 Serg. & Rawle, 23; and a memorial to a board of excise, remonstrating against the granting of a tavern license, *Vanderzee v. M'Gregor*, 12 Wendell, 545. In regard to such writings, there is certainly no authority for saying that, in form, the injured party shall be put to his action for a malicious prosecution, complaint or remonstrance; nor would it, perhaps, be safe to interpose such a restriction. Although the reason for giving countenance to information may be of as much force as that in respect to judicial prosecutions for crime, yet the precautions against ill-founded charges and irregularities in conducting them are much less; nor is there any restraint by settled precedents and forms of proceeding. To this intermediate class between judicial prosecutions and privileged commu-

Howard v. Thompson.

nications in regard to matters having no immediate connection with the functions of government, the letters in question belong. The form of the action we take to be correct, but this is certainly not decisive of what shall be deemed full proof to sustain it. Must the plaintiff show not only malice but want of probable cause, the same as if the action had been technically for a malicious prosecution? The evidence established no publication at large, none in the newspapers, no reading to the neighbors. The letters were addressed to the officer having the power, and on whom rested the duty to remove, if the cause assigned were found by him to be true; and they were forwarded directly to him. Nothing impertinent can be imputed to them. There is not the least doubt that, so far, they were for the reasons assigned in *Thorn v. Blanchard*, and other cases already cited in connection with that, as much without the doctrine of *libel* as an *indictment*. They were equally, not to say still more so, upon the reasoning of *Fairman v. Ives* and other English cases hereafter to be noticed; for some of the latter, I think, take them absolutely out of the doctrine, under any qualification. They very nearly resemble the printed book sought to be prosecuted in *Rex v. Baille*, 2 Esp. N. P. 91, Gould's ed. of 1811. It contained an account of the abuses of Greenwich Hospital, treating the officers of that institution, and Lord Sandwich in particular, who was then first lord of the admiralty, with much asperity; but copies were distributed among the governors of the hospital only. On motion for a criminal information, Lord Mansfield stopped the prosecution on the point that such a proceeding did not amount *even to a publication*. He put it on the ground that the distribution had been confined to persons who were, from their situation, called on to redress the grievances complained of, and had, from their situation, power to do it. If this was not a *publication*, certainly no private action could have been maintained as for a libel. Holt on Libels, 290, N. Y. ed. 1818, The party must have been turned over to an action for a malicious prosecution of the complaint, in which form he must have shown, on his own side, a want of probable cause. It is better, perhaps, that such a form of action

Howard v. Thompson.

should not be exacted. There is room, I think, for saying, on principle and authority, that on showing enough to take away the privilege, that is to say, when the party has defrauded the rule which confers it, he is a false libeller. The rule is void as to him. What facts work a nullity? It does not follow that, because we allow an action of slander, the defendant should, therefore, be put to justify, as in the ordinary action, by proving the truth. That is not so even as to writings which concern private matters. On its appearing that they are privileged, the defendant is protected under the general issue, until malice is shown. When we come to information, in which not only the interests of the private citizen as related to the country, but those of the nation itself are concerned, the difficulty of turning a case against him wherein he is presented as *prima facie* in the path of honest duty, certainly ought not to be less; and both the prevailing opinions in *Thorn v. Blanchard*, which was decided by the court of errors, required more. They held that the action, though in form for a libel, was in the nature of a malicious prosecution. *L'Hommedieu*, senator, said the council of appointment being a court, if he might so call it, to hear all complaints against officers, &c., there is an implied protection for the complainants, unless it can be proved that the complaints were malicious. 5 Johns. R. 527. *Clinton*, senator, carried these premises out more distinctly to their consequences. He said it was incumbent on the plaintiff to prove that the petition was *false, malicious* and *groundless*; and he goes into the reasons at length, repeating and illustrating the position. *Id.* 529, *et seq.*

The case of *Gray v. Pentland*, before the supreme court of Pennsylvania, was of the same character; and I understand all the judges as admitting that the suit, though in form of a libel, was in the nature of an action for a malicious prosecution; though they do not, like the opinions in *Thorn v. Blanchard*, throw, in express terms, the *onus* of showing want of probable cause on the plaintiff. *Fairman v. Ives*, 5 Barn. & Ald. 642, was an action for a libel. The paper complained of was a representation by a creditor of the plaintiff, a half pay officer, addressed to the secretary at

Howard v. Thompson.

war, charging him with fraudulently evading the payment of a debt. All the court agreed that, if the representation was honestly made, that was a defence under the general issue. *Holroyd, J.* mentioned as an analogous case, words spoken by a barrister in the course of a cause, in which he said, "it may not, perhaps, be sufficient to allege and show even that the words are false and malicious, without also alleging and showing that they were uttered without reasonable or probable cause." *Best, J.* said he did not think there was a sufficient *publication* to support the action; and mentioned the case of *Greenwich Hospital*; but adds, "if the communication be made maliciously *and without probable cause*," an action will lie. In *Vanderzee v. M^r Gregor*, 12 Wendell, 545, there was a failure to prove either malice or want of probable cause; and the court said the plaintiff could not recover without proving *express malice*. It was unnecessary to go farther. The court professedly acted upon the authority of *Thorn v. Blanchard*; and they could not mean to imply that you may recover on showing malice, where there appears to have been probable cause, contrary to the strong expressions in that case, nor even to deny that the plaintiff must himself show a want of probable cause. In the principal case, there was nothing to throw a shade of suspicion upon the motive. It was the simple remonstrance of a neighbor against the licensing of a tippling shop, which is, I must say, somewhat unfortunately, still recognized as an object of legal protection, *lucris causa*. It was a call to withhold the privilege of peddling popular poison from hands which were believed to have abused that privilege. It is to be feared there are too many real not to say melancholy causes of personal offence against dealers in alcohol; cases of private suffering which may engender hatred and malice in those who are reached by its influence; and shall their state of mind, where they act upon probable appearances, though mistaken in the fact, be imputed to them as a fraud *per se* upon the protective rule? In *Fairman v. Ives*, the creditor showed, in his letter to the secretary at war, that he must have been greatly provoked by the apparently mean evasions which the half pay officer had

Howard v. Thompson.

practised, to avoid the payment of his honest debt ; and though it turned out that the creditor was mistaken, the court held him protected by *probable cause*, without regard to his state of mind. He was there personally interested ; and the supposed provocation had rankled into a sinister desire to punish the delinquent—express malice of a severe complexion ; yet the protective rule was held to be unbroken. In this case too, as we have seen, Best, J. like Lord Mansfield in the case of *Greenwich Hospital*, denied that the paper had been *so published* as to make it a libel. That is clearly going farther than did Clinton, senator, in *Thorn v. Blanchard* ; for he thus not only demands the same measure of proof as in an action for a malicious prosecution, but the same form of action *mutatis mutandis*, while *Thorn v. Blanchard*, is content with the proof.

If the action is to be regarded as standing on the same footing as to evidence, with one for a malicious prosecution, I need hardly go into the authorities to prove that whatever degree of malice may be shown, it is still necessary to go farther, and establish want of probable cause. The cases of *Purcel v. M'Namara*, 1 Campb. 199, *Incedon v. Berry*, id. 203, note (a) with id. 206, note (a) and the authorities there cited, are full to the point. The cases to the same point are yet more fully collected in 2 Selw. N. P. Philad. ed. 1839, p. 1079, note (2.) And *vide per* Nelson, J. in *Weaver v. Townsend*, 14 Wendell, 193. I confess I am strongly inclined to think that the same quantum of proof is necessary in actions for this class of libels, and that the plaintiff should, therefore, have been nonsuited ; although I admit the judge was right in saying there was such proof as might be taken into the consideration of the jury on the question of express malice.

But admitting the *onus* to lie on the defendant, the cases cited agree most clearly, that actions for petitions or remonstrances addressed to the appointing power, being *quasi* for a malicious prosecution, will not lie where it comes out on the whole evidence, that there was probable cause. I refer particularly to *Thorn v. Blanchard*, and *Gray v. Pentland*, with the general remark that they are entirely sustain-

Howard v. Thompson.

ed, at least in this, by the whole body of British authority. Adequate references will be found in *Thorn v. Blanchard*. The marginal note to *Gray v. Pentland* states that such libels are "excused if they did not originate in malice *and* without probable cause." Tilghman, Ch. J. there took the view most favorable to the plaintiff, yet remarked: "Any thing which satisfies the jury that the proceeding did not originate in malice *and* without probable cause, is sufficient to excuse him." 2 Serg. & Rawle, 30.

At any rate, all the cases which have spoken to the point, hold that probable cause, when shown by the defendant, will make out a complete defence; or is receivable in mitigation: and so much, at least, was agreed by the learned judge, who tried the cause now before us. It was received in mitigation where the libel was published by the editor of a newspaper against an elective officer, after he had succeeded in his election. *Vid. King v. Root*, 4 Wendell, 114, 139, 143. Some courts have held that, even in the ordinary action of slander, the defendant may show in mitigation, that a person *told him* what he uttered as a slander, especially where the slander, in terms, professes to be founded on a hearsay. *Kennedy v. Gregory*. 1 Binn. 85. It will never do to say that where there are circumstances raising strong suspicion of official misconduct, the friends of the officer, or persons indifferent alone, shall come within the protection. It is important that others more ready to complain, should be equally favored. There is no reason if they bear actual ill will to the plaintiff, why this should remove from them what would be, of itself, a complete shield to the rest of the community. This brings us to the only remaining question in the case.

Suppose I am mistaken as to the *onus*, was there not here proof of probable cause? Or, at least, so much evidence that the judge was not warranted in withdrawing the question for the jury?

The plaintiff himself admits that he took the timber entrusted to him as keeper of the public stores, and converted it to his own use, in building a dwelling house. The defendant saw, or at any rate was informed of the fact by a

Howard v. Thompson.

neighbor, who suggested that it would be well to communicate the fact to the government. This the defendant did, at the same time drawing his own reference that the act was done fraudulently. Admitting for the present, that the plaintiff had a right thus to convert the timber, can it be said that his conduct was so entirely pure on its face, as to raise no misgivings in the minds of his neighbors? They knew him for a public trustee; and saw him converting to his own use, a portion of what he had in charge. They knew nothing of the manner in which he had acquired a title. Suppose one of them had seen a carrier start with a box of goods; and overtaking him on his way, far from the eye of his bailor, had afterwards seen him in the act of breaking bulk, and selling a part of the goods. Such a juncture of circumstances would, in a court of justice, be *prima facie* evidence of larceny; and could it be said that the spectator would be open to a malicious prosecution should he procure an indictment? If his neighbor, happening to see the same thing, should inform him of it, and urge a prosecution, this would heighten his suspicion. It would operate as an additional cause for the prosecution. Indeed; had he merely heard of the circumstance from the observer, it is by no means certain that he would not be justified in giving information to the magistrate. In *Cockayne v. Hodgkisson*, before stated, the judge put it to the jury to say, whether the defendant had been told by a third person what he had communicated in the libel; and whether he believed it; and we have seen that the same thing has been received as mitigating evidence in actions for common libels and slanderous words. It would not differ the case, that the carrier had secretly bought of his bailor, the articles which he took from the box, unless the defendant had been informed of the purchase. *Weaver v. Townsend*, 14 Wendell, 192, which was a case of malicious prosecution, turned on the fact that the defendant knew the plaintiff had a *prima facie* title to the property, for stealing which the defendant had caused him to be indicted.

I do not see that the case at bar comes materially short of the supposed carrier's, except in the degree of the offence.

Howard v. Thompson.

In that, the circumstances would raise a suspicion of larceny; in this a suspicion of embezzlement. That the act, was done openly, is by no means conclusive to the mind, nor has it much force, unless it appear that the owner was present or known by the peculator, to have means of promptly detecting and punishing him. With others it might be regarded as a mere affectation of conscious innocence. If the property taken was trifling in amount, with some, that might lull suspicion, while with others it might increase it, and be considered as an index to greater spoliations. "If," says Washington, J. in *Wilmarrh v. Mountford*, 4 Wash. C. C. R. 79, 84, the plaintiff, "by his folly or his fraud, exposed himself to a well grounded suspicion, the prosecution had, at least, probable cause for its basis, and this is sufficient to defeat the action."

It appears to me that the judge in this view of the matter was most clearly bound, at least, to have left the question to the jury. If it was to be decided as matter of law and that is generally so with the question of probable cause, where the facts are undisputed, Dallas, J. in *Hill v. Yates*, 2 B. Moore, 80, 82; *Pangburn v. Bull*, 1 Wendell, 345; *Gorton v. De Angelis*, 6 Wendell, 418; then, I think, he should have told the jury that probable cause had been established.

But it is objected that the defendant was too late in his offer to show probable cause, after he had set up on the record, that he would prove the truth. It is a sufficient answer to say that the judge did not think so, and the defence proceeded on the ground that the proof was admissible. If the defendant had been denied that view, *non constat* but he might have pursued his notice of justification by giving farther evidence of its truth. But independent of the course thus taken, we have seen enough to say that the objection is founded on a misapplication of the cases. It is indeed generally true that such a justification, where the defendant fails to prove it, may be used as evidence of express malice; and it is too late to waive it at the trial, and resort to mistake. *Patty v. Stetson*, 15 Mass. R. 48. Walworth, chancellor, in *King v. Root*, 4 Wendell, 139, 140. *Clinton v.*

 Howard v. Thompson.

Mitchell, 3 Johns. R. 144. *Lent v. Butler*, 3 Cowen, 370. But the rule is co-extensive with those cases only where probable cause is matter of mitigation merely. In actions for a malicious prosecution, or *quasi* such, where it makes a bar, the reason ceases. It was never held, that because a man pleads in bar specially, or gives notice of special matter, he shall be cut off from another defence which is receivable under the general issue. The contrary has often been held. *Levy v. Gadsby*, 3 Cranch, 180, 186. *Smith v. Gregory*, 8 Cowen, 114. *Fulton Bank v. Stafford*, 2 Wendell, 483. *Bradley v. Field*, 3 id. 272.

But more. It is not quite easy to see, that on the plaintiff's own showing, his case was exempt from a still stronger view, had the defendant chosen to pursue it. Swartwout, the collector, had given the plaintiff leave to take the timber, and the letters alluded to him as a party to the frauds which were going on. He was called as a witness, but certainly did not make the plainest case of the matter against actual embezzlement. Admitting him to have had a right to sell the timber at auction, or otherwise, for the best price he could get; that did not authorize him to *give*, any more than it did the plaintiff to *take* it, in exchange for an article of mere luxury, or at most, convenience, viz. the bath house which the plaintiff volunteered to build for the United States. Nor was the manner of payment by any means the most prudent. Telling the plaintiff to carve for himself, till he was satisfied, might certainly have been no more than was due from Mr. Swartwout to him as an honest neighbor, had the timber in question belonged to him in his own right. Holding for the public, it at least laid the proceeding open to invidious remark; nor can I collect that Swartwout took any precaution to limit the amount within the measure of a just *quid pro quo*. In short, a *carte blanche* was given to the plaintiff, first for himself, and secondly in favor of the poor inhabitants, for the purposes of fuel. I repeat, that all this might have been very well as a disposition of Mr. Swartwout's own property; but that it was not technical embezzlement when applied to the public property, is by no means clear. It might not have been morally so; but it

Howard v. Thompson.

was an instance of such gross neglect in a few things, as might well lead a citizen, jealous of the public rights, to question whether the same practices had not been extended to many things by the same men. Though in itself a "trifle light as air," it disclosed a principle which might have operated as "confirmation strong" that more extensive speculation had been committed in secret, especially when taken in connection with the late poverty of the plaintiff, his small wages, his extravagant living and the now splendid mansion, in the erection of which he was employing the property of the nation. These things are asserted in the letter, and not contradicted by the proof. I admit, that in the ordinary action of slander, they would be presumed false. In this we have seen the presumption is reversed, and I therefore mention them.

Had all the circumstances of this case been disclosed to the treasury department, I can hardly believe that its upright, able and sagacious head would have voluntarily surrendered these letters to be used as evidence. In *Gray v. Pentland*, the court held that they could not compel the governor to produce the paper, nor would they allow parol evidence to be given of its contents. Being a complaint properly addressed to him as a visitatorial magistrate, the court held, upon the ground of policy, that they would not control the exercise of his discretion, nor would they allow its intended effect to be evaded by the introduction of secondary evidence. In this they were fully sustained by the decisions at Westminster Hall, and several cases which might be cited from American books. I know that the right of remonstrance may be abused; and I cannot doubt that the secretary was pressed with what the defendant's counsel admitted at the bar: the great public services and elevated character of the plaintiff. Had the defendant printed and published his remonstrance, the case would have been far different; his privilege then would have been lost. Even the privilege of parliament is forfeited by a member publishing a slanderous speech or a slanderous report. But, for aught that appears, these letters have performed no other office than furnishing a sort of information, vital, above all

Leo Wolf v. Merritt.

things, to the safe operation of the fiscal department of the government. At any rate, whatever may be the general merit of the plaintiff, and however innocent he may be in the particular matter, we cannot hold the defendant criminal for thus communicating what the plaintiff has been so unfortunate as to give him probable cause for supposing to be true.

New trial granted.

W. & J. LEO WOLF vs. MERRITT.

Where premises, situate in the city of New York, were demised for a term over six and less than nine months, "*at the yearly rent of \$300, payable quarterly,*" IT WAS HELD, that the time of the first payment of rent was not deferred until three months from the date of the lease, but that the rent was payable on the usual quarter days for the payment of rent in the city, happening after the date of the lease.

ERROR from the New York common pleas. Merritt sued the Leo Wolfs for seizing and selling his property under a distress warrant for rent, in which more rent was claimed than was due, and after a tender of the amount actually due. The defendants pleaded *non cul.* The plaintiff produced a lease, signed by William Leo Wolf, stating in substance, that the signer on the first day of October, 1835, had demised certain premises, situate in the city of New York, to the plaintiff, up to the first day of May, then next, *at the yearly rent of \$300, payable quarterly.* The plaintiff also produced a receipt signed by the landlord, dated 6th November, 1835, in which he acknowledged to have received of the plaintiff "the remnant of the rent, viz. for October," specifying the sum of \$25 as received for the demised premises. On the second day of April, 1836, the property of the defendant was seized under a distress warrant, in which the landlord claimed \$90 as the balance of two quarters rent, from 1st October, 1835, to 1st April, 1836. The warrant was signed "For William Leo Wolf, J. Leo Wolf," and J. Leo Wolf directed the levy, which was subsequently approved by W.

Leo Wolf v. Merritt.

Leo Wolf. Besides the above sum of \$25, the plaintiff had paid the sum of \$35. The distress was made on the 2d April, and on the same day the plaintiff *tendered* to the marshal who made the distress, the sum of \$40, in full of rent, interest and costs, which the marshal refused to accept, and on 13th April, sold the plaintiff's property; the sales amounting to \$84. The whole case turned upon the construction to be given to the lease as to the *times* of payment. The landlord contended that the rent was payable *quarterly* commencing from the date of the lease; and if his construction is right, there was \$90 due to him on the first day of April, after deducting the payments made. The tenant insisted that the lease ought to be construed in reference to the *quarter days*, established by statute, as applicable to the city of New York; and if so, he was liable to pay on the first day of *November* the *one month's rent* then due; on the first day of *February* a full quarter's rent, and on the first day of *May* the remaining quarter's rent; and according to this construction, there was *due* at the time of the distress only *four months rent*, viz. \$100, of which \$60 had been paid, leaving \$40 as the sum for which a distress might legally be made. The presiding judge submitted the construction of the lease to the jury, who adopted the plaintiff's construction, and assessed his damages at \$300, at which amount they found a verdict in his favor. The defendants having excepted to the submission of the question of construction to the jury, sued out a writ of error.

S. Stevens, for the plaintiffs in error.

I. Greenwood, for the defendant in error.

By the Court, NELSON, Ch. J. The question involved in the case is, whether the quarterly payments are to be counted from the first of May, preceding the date of the lease, regarding the usual quarter days in the city of New York, and which are fixed also by statute in the absence of any regulation to the contrary; or from the beginning of the term. The court below adopted the former view accord-

Leo Wolf v. Merritt.

ing to which there was only \$40, instead of \$90 rent in arrear.

The language of the lease is so obscure, that the intent of the parties cannot very satisfactorily be ascertained. It is so much so, that I think it would be wrong to reverse the judgment below, even if we might incline against the view taken of the question by the common pleas. There are cases so nearly balanced and doubtful as to which way the right lies, that different minds may fairly arrive at different conclusions, and upon about the same force of argument. They are not cases for review, nor should they be encouraged.

My own impressions upon reading the lease, are in accordance with those of the court below ; what has mainly influenced them is, that the landlord evidently had in his mind the *whole yearly rent*, giving *that* as the criterion by which to ascertain the rent *per quarter*—"at the yearly rent of \$300, payable quarterly;" and looking at the connection here, and regarding the quarterly payments as controlled in respect to *time*, as it must be conceded they are as to *amount*, by the term yearly rent, they are properly calculated from the *first of May*, that being the beginning of the rent year in the city of New York. 1 R. S. 744, § 1.

Quarterly payments cannot well be applied to a term of *seven months* ; it would require a division of the month to carry it out. And the difficulties are not removed by the construction insisted upon by the counsel for the plaintiffs in error, that the rent became due at the end of each quarter year, beginning with the 1st October. The payments were to be made quarterly. The month beyond the two quarters, upon this view, could not be brought very consistently within this phraseology ; at least, I think, the language more naturally refers the quarter to the usual quarter days for the payment of rent in the city. Then the rent for October falls within the quarter ending the first day of November. The parties themselves seem, originally, so to have understood the agreement, and I think it best supported by the language used.

Nicholl v. Mason.

Though the court below erred in not deciding this as a pure question of law; the error is immaterial, as the jury came to a right conclusion.

Judgment affirmed.

NICHOLL vs. MASON & SPAULDING.

In pleading a judgment rendered by a justice, it is not necessary for the purpose of showing jurisdiction in the magistrate to allege that a *plaint* was levied or *process* issued; it is enough if facts be averred showing that he had jurisdiction over the persons of the parties and the subject matter of the action.

A suit cannot be *abated* by a plea that another action for the same cause was *afterwards* commenced; but a judgment in such second suit, in favor of the plaintiff may be pleaded in *bar* of a recovery for the same cause of action.

On demurrer to a plea *puis darrien continuance*, it cannot be objected that it is not verified by affidavit, nor that it is accompanied by another plea; such questions can be raised only on motion.

DEMURRER to plea. The plaintiff declared in *assumpsit*. The first count of the declaration was on a *joint* and *several* note made by the defendants for the sum of \$45, payable to the plaintiff. The declaration was of *July term, 1834*; and on the sixth day of *December* following, *Mason* one of the defendants, pleaded, first, *non-assumpsit* to the whole declaration; and *secondly*, to the first count, that the plaintiff ought not *further to have or maintain* his action, &c., because after the commencement of this suit, and after the last continuance thereof, to wit, on 15th November, 1834, at, &c., the plaintiff sued him, *Mason*, before a justice of the peace, for the same cause of action specified in such count, that the parties appeared, that issue was joined and the action tried before the justice, and judgment rendered on the merits in favor of the defendant *Mason*. To the second plea the plaintiff demurred, assigning for causes of demurrer, 1. That this plea, *puis darrien continuance*, is pleaded with non-assumpsit; 2. That it not verified by affidavit; 3. That sufficient is not stated to give the justice jurisdiction; 4. That the plea contains no proper traverse,

Nicholl v. Mason.

is not capable of traverse, &c. : to which was added, on the argument, the objection, 5. That a subsequent action cannot be pleaded in bar of an action previously commenced ; that the pendency of this should have been set up as a defence to the suit before the justice ; and 6. That a judgment in an inferior court does not bar an action in this court. *Joinder* in demurrer.

A. C. *Hand*, for the plaintiff.

D. E. *Wheeler*, for defendant.

By the Court, BRONSON J. If the second were strictly a plea *puis darrien continuance*, the objections that it is pleaded with another plea, and is not verified by affidavit, could not be taken in this form. On demurrer there is no inquiry about collateral facts ; the only question is, whether the pleading is good upon its face. But these objections would not prevail on motion. When matter of defence arises *after* plea, and is pleaded *puis*, it is a waiver of the defence originally set up, and the plea should, in some cases be verified by affidavit. But here there had been no *prior* issue. The defendant was pleading in bar for the first time ; and in such a case I know of no rule which either required him to swear to the plea, or precluded him from setting up as many different defences as he might happen to have.

In pleading the judgments and proceedings of inferior courts, it is not enough to aver generally that the court had jurisdiction ; facts must be stated which show that the court had jurisdiction. *Cleveland v. Rogers*, 6 Wendell, 438. *Sheldon v. Hopkins*, 7 id. 435. A declaration on a justice's judgment has, in modern times, been excepted from the operation of this rule. *Smith v. Mumford*, 9 Cowen, 26. *Stiles v. Stewart*, 12 Wendell, 473. Although this is a *plea*, and falls within the general rule, it can, I think, be upheld. It is not only averred in general terms that the cause of action was within the jurisdiction and cognizance of the justice, but *facts* are stated which show that the averment is true. The allegation is, that the party was impleaded *for the same*

Nicholl v. Mason.

cause of action mentioned and specified in the first count of the declaration. That was a promissory note; a subject matter clearly within the cognizance of the justice. Then, as to jurisdiction over the person, although the pleader has not followed the precedents, and alleged that a plaint was levied, or process issued, he has averred that *the parties appeared* in the action, and that upon *issue joined* therein, the same was then and there tried before the justice. A voluntary appearance and joining issue, without process, is sufficient. This plea, then, states facts which show that the justice had jurisdiction over the person of the parties and the subject matter of the action; and that is enough.

The pendency of another suit for the same cause of action may be pleaded in *abatement* of a suit *subsequently* commenced; but the converse of the proposition does not hold true. The *original*, or *first* suit, cannot be abated by a plea that another action for the same cause was *afterwards* commenced. *Renner v. Marshall*, 1 Wheat. 215. But this doctrine does not overturn the plea. The defendant does not set up matter in abatement, but in bar of the action. He does not plead the *pendency* of another suit, but a *judgment rendered*. The plea does not go to the *form* of the remedy, but to the right of the plaintiff. It shows that the cause of action which the plaintiff once had is gone forever. I can see no good reason why the defendant should not be at liberty to set up this, as well as any other bar to the further maintenance of the action, which may have arisen since suit brought. It is true that he might have pleaded in abatement before the justice; but the omission to do so, cannot be construed into a waiver of the right to set up matter in bar which had not then arisen. He has omitted no opportunity of pleading the trial and judgment before the justice; and that judgment is none the less conclusive because the defendant might have got rid of the action in another way. If the plaintiff had recovered on the former trial, he would hardly think of maintaining this action. It would be giving him two judgments against the same party for one debt. But the question now is the same, in principle, as it would be if the

 Blanchard v. Ely.

plaintiff had recovered before the justice. The original cause of action is merged and gone—not because the one party or the other prevailed on the former trial; but because the right has been tried, and adjudged one way or the other.

The judgment of an inferior court, acting within the scope of its powers, is no less conclusive than the judgment of a court of general jurisdiction. The plea is, I think, sufficient both in form and substance.

Judgment for defendant.

 BLANCHARD vs. ELY and others.

In an action for the recovery of the price stipulated for the building of a *steam-boat*, the plaintiff is entitled to recover the full amount, without any deduction by way of *recoupment* of damages to the defendant in consequence of damages sustained by him for the *loss of trips* and the *profits* resulting therefrom occasioned by defects in the boat or its machinery.

The defendant in such case is, however, entitled to an allowance for moneys necessarily expended by him in supplying *defects* in the vessel or its machinery, so as to make it conform to the plan specified in the contract; and where it is manifest that an allowance on that account ought to have been made, and was not made by the jury, a new trial will be granted.

The courts of *common law* seem inclined to adopt the rules of the *civil law* in respect to damages for the breach of contracts relating to personal property, which is that the party entitled to claim performance may claim *damages* for the non-performance in respect to the *particular thing, the object of the contract*; but not such as may have been accidentally occasioned thereby in respect to *his own affairs*—as for instance, a *lessee* who is evicted by title paramount may claim the *expense of removal* and indemnity for *advanced rents*, but is not entitled to recover for *loss of custom* established whilst residing in the house.

It is no bar to a recovery that one of several defendants has become possessed of the right of action prosecuted against him and his co-defendants, unless his name appears upon the record both as *plaintiff* and *defendant*. The doctrine of *damages* generally considered.

THIS was an action of *debt*, tried at the New York circuit in October, 1837, before the Hon. OGDEN EDWARDS, one of the circuit judges.

In *September*, 1834, a contract was entered into between the parties, by which the plaintiff engaged to build for the

Blanchard v. Ely.

defendants a *steam-boat*, intended to ply on the Susquehanna river between *Owego* and *Wilkesbarre*; the boat to be completed and put in operation by the first day of *May*, 1835, for which the plaintiff was to be paid the sum of \$12,500. The boat was built but not entirely completed, when she was *accepted* by a *committee* of the defendants, and proceeded down the river about the *seventh* day of *May*; she was accepted on condition that what remained to be done in her completion, should be done, and which was not done until some time in *July*. On her return to *Owego* she broke her shafts, which were repaired at the expense of the plaintiff. This delayed her four days, and after she again started for *Owego* was delayed sixteen days more by reason of the lowness of the water. On her second trip she again broke her shafts, and the defendants, at their own expense, procured a new set from New York, which cost about \$700. The defendants, after they had took possession of the boat, enlarged her wheels and made other alterations, and proved that the guards were too low, and that the expense of altering them would cost \$250. Several witnesses for the defendants proved the iron of the shafts to be bad: in this, however, they were contradicted by the plaintiff's witnesses. It was proved that a trip between *Owego* and *Wilkesbarre* could be performed in four days at a nett profit of \$100 per trip, and that the river between those places is navigable only four months in the year. When the plaintiff first rested, the defendants produced in evidence an instrument under seal, bearing date 28th *May*, 1835, executed by the plaintiff, whereby, for the consideration of \$500, the plaintiff assigned to *James Pumpelly*, one of the defendants in this cause, the *contract* upon which this suit is brought, and stated therein that he had received and endorsed upon the contract the sum of \$7975 34, and that he had directed his attorney to pay over the balance due upon the contract, when collected, to *Mr. Pumpelly*, after deducting certain charges. On the production of this instrument, the plaintiff read in evidence an instrument of the same date, signed by *Pumpelly*, whereby he engaged to pay over to the plaintiff all moneys he should receive by virtue of the assignment made to him,

Blanchard v. Ely.

deducting such sums and interest thereon as he had that day advanced to the plaintiff. The defendants insisted that the assignment thus executed to Pumpelly, one of the defendants in the cause, was a bar to a recovery. The judge, however, ruled otherwise, and instructed the jury that they should deduct from the amount otherwise due to the plaintiff such sum as would be equal to the expenses necessarily incurred by the defendants in remedying such *defects* as existed in the boat or its machinery; but that they were not authorized to take into consideration the delay of the boat, or loss of trips, or loss of profits consequent upon any defect in the boat or machinery in reducing the amount of the plaintiff's recovery—the damages sustained by the defendants from those causes being too remote and consequential to be allowed in this action, and the remedy of the defendants for any injury sustained from those causes being by action against the plaintiff. The jury found a verdict in favor of the plaintiff for \$5240 31, and consequently must have allowed the whole sum of \$12,500, with the interest thereof from 1st May, 1835, *deducting* only the sum admitted by the plaintiff in his assignment to Pumpelly to have been received by him, and a sum of about \$100 besides. The defendants asked for a new trial.

S. Stevens, for the defendants.

S. P. Staples, for the plaintiff.

By the Court, COWEN, J. The objection that the assignment of the articles of agreement by the plaintiff to one of the defendants, should have been received as a bar, is founded on the principle that where the right of the creditor and the liability of the debtor, or any one of several debtors meet in the same person, such coincidence works a release by operation of law. The reason is that a man cannot sue himself; the action is suspended by the voluntary act of the creditor; and is gone and discharged forever. 2 Wms' Exec. Phila. ed. 1832, p. 811. It is obvious from the bare statement of the argument, that it must mean a vesting of the

Blanchard v. Ely.

legal right, or, in other words, a right to sue in the creditor's own name, in the person of his debtor. Otherwise the reason fails. It will, I apprehend, be found applicable to those cases only where the same individual, in order to sue, must appear on the record both as plaintiff and defendant. *Mainwaring v. Newman*, 2 Bos. & Pul. 120. The case of *Van Ness v. Forrest*, 8 Cranch, 30, will be found an authority for this distinction. Besides, it is suggested that the assignment in this case was merely by way of pledge, or security to one of the defendants for money lent; the plaintiff thus still retaining his interest as general owner. It is certainly very clear, that even if he could have divested his legal interest by an absolute assignment, that could not be done by merely *pledging* it; but he could not part with it in either form. This court has held that a defendant may, before suit brought, purchase a chose in action against the plaintiff, and use it as a set off: and we have often held that the *assignee* is the real party, and shall be protected. But this has always been held in an equitable sense, which would rather go to *favor* the present action than to *defeat* it.

Did the judge narrow the jury too much in the rule of damages? The plaintiff had failed in some comparatively trifling respects, to make so perfect a boat as he had stipulated for. The shafts were not of adequate strength, in consequence of which the boat was interrupted in some of her trips; and the company incurred expense in procuring repairs to be done, and in towing the boat to a proper place for undergoing her repairs. All this the judge left to the jury to deduct in their discretion, from the acknowledged balance of account for building her. But he directed them not to allow for *delays*, and for *profits* which might have been made from the trips that were lost. No common law authority was cited at the bar, one way or the other, having any direct application to the measure of damages in such a case as this; nor am I aware that any exists. If there be none, it is somewhat singular, considering the many contracts for building boats and other vessels which must have been made in England and this country. We have

 Blanchard v. Ely.

to regret that the attention of the counsel seemed to have been entirely turned from the character of this claim in the abstract, by a remark of the judge implying that damages for loss of profits were admissible in a *cross action*, but not in *mitigation*. This led the counsel for the defendant to stop with citing *Reab v. McAllister*, 8 Wendell, 115, to show that proof of any damages arising from a plaintiff's breach of the contract upon which he sues, may be received to reduce his claim. This we all understand to be clearly so. The counsel for the defendant, too, merely thought it their duty to cite cases showing that in an action on a warranty of land, the plaintiff recovers only the consideration money paid, with interest and costs, &c.; and we were reminded particularly of one reason for that rule as given by Chief Justice Savage, in *Dimmick v. Lockwood*, 10 Wendell, 150, viz. "That it would be ruinous and oppressive to make the seller respond in damages, for any accidental rise in value of the land or the increased value in consequence of the improvements by the purchaser." He, at the same time, however, notices some technical reasons for the rule which render it less decisive in respect to executory contracts, especially those which regard personal property. The prevalence of the rule is very extensive in its application to covenants of title. Vide 1 Selw. N. P. 533, Phil. ed. 1839. The rule is more pertinent when applied, as it has been in several cases to the breach by failure of title of a covenant to convey. *Baldwin v. Munn*, 2 Wendell, 339. Sutherland, J. there adopts a former remark of Ch. J. Kent, importing that it must block up sales of real estate, if the vendor were to be made liable in proportion to the rise of property. It is added on the same authority, that "The safest rule is, to limit the recovery as much as possible, to an indemnity for the actual injury sustained, without regard to the *profits* the plaintiff has failed to make." Id. 406. This was A. D., 1829. As long ago as 1811, in *Letcher v. Woodson*, 1 Brock. 212, Marshall, Ch. J. laid down the rule of damages on a similar covenant, in nearly the same words with Mr. Justice Sutherland. *Combs v. Tarlton's Admrs.*, 2 Dana, 466, 7, S. P., A. D. 1834. This rule would cut off all rise of the value intermediate the contract

Blanchard v. Ely.

and time fixed for its execution. The rule on agreement to sell and deliver goods, is universally broader; giving the vendee advantage of the rise in market, and the consequent advantage of profit on any sale which he might have made at the time stipulated for delivery, or whenever it becomes due. *Snee v. Huddleston*, Sayer's Dam. 49. See many other cases cited in Ch. J. Marshall's note to *Letcher v. Woodson*, 1 Brock. 218. *Clark v. Pinney*, 7 Cowen, 681, 687, and the cases there cited. Nay more, under circumstances, the rise is considered even down to the time of the trial. *Id.* The rule of damages in respect to contracts for the sale of chattels is the general one, and some courts have refused to depart from it, in measuring damages for breach of covenants to convey real estate. *Hopkins v. Lee*, 6 Wheaton, 109, 117, 118. *Cannell v. McLean*, 6 Har. & Johns. 297. I do not dwell upon these cases, more of which may perhaps be found. In both classes, the courts are seeking after an indemnity; that is to say, making good to the vendee what he has paid his money for. Both classes of cases profess to deny the allowance of damages remotely consequential, as of profits resting in speculation. The possible or even probable use to which the vendee may put the property, aside from a market sale, is clearly excluded. Going upon analogy, then, suppose the owners of this boat, the defendants, had sold out; in the absence of evidence that there had been a rise of the boat's value in market, we must take the stipulated value at which it was to be built, *Bailey v. Clay*, 4 Rand. 346, and then the sum which would command the materials and work for making good the defects, would be the measure of damages in an action, or by way of recoupment in a defence. In like manner, a contract to insure a cargo will not, in the event of loss, carry the speculative profits of the adventure, though these may be insured in express terms, even by an open policy. 1 Phil. on Ins. 320, 325. *Id.* 46. Yet, insurance is called pre-eminently a contract of indemnity. The damages are what will restore the value of the cargo on ship board at the port of departure. *Id.* 46, *et seq.* The rule is nearly the same in respect to damages for breach of warranty. The defect

 Blanchard v. Ely.

arising from the vice warranted against, must be made good in such sense that the article shall fetch a sound price, which *prima facie*, we have seen is the one agreed on between warrantor and warrantee. 4 Rand. *ut supra*. 2 Leigh's N. P., Philad. ed. 1838, p. 1506. *Caveat emptor in search of a horse*, 1 Rural Lib. N. Y., No. 5, for 1837, p. 140. *Clare v. Maynard*, 7 Carr. & Payne, 741; 1 Nev. & Perr. 701, S. C. *Chesterman v. Lamb*, 4 Nev. & Mann. 195; 2 Adolph. & Ellis, 129, S. C. 1 Selw. N. P., ed. before cited, p. 654, tit. Deceit, I. 1, and notes. *Bacon v. Brown*, 4 Bibb, 91. Yet, in all the cases mentioned, as in that of insurance, there is no doubt, that by an express contract, on good consideration, the vendor may stipulate expressly to indemnify in respect to loss of profits arising from the defect against which he contracts. In short, it will be seen by the cases cited and many more, that on the subject in question, our courts are more and more falling into the track of the civil law, the rule of which is thus laid down by a learned writer: "In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it; and not such as may have been accidentally occasioned thereby in respect to his own affairs." 1 Evans' Poth. 91, Lond. ed. 1806. He illustrates the rule by the rise of value in goods which the promissor fails to deliver. He adds, if the lessor's title to a house fail, he is bound to pay to his lessee the expense of removal, and indemnify him against the advance of rents, but not against the loss of custom in a business he may have established while residing in the house. He also adverts to the distinction that the vendor may, notwithstanding, incur liability for extrinsic damages of the creditor, if it appear they were stipulated for or tacitly submitted to in the contract. One instance is that of stipulating to deliver a horse in such time that a certain advantage may be gained by reaching such a place. There the debtor shall, on default, pay for the loss of the advantage. The case of tacit submission is illustrated by a case of demising premises expressly for use as an inn. There, if

Blanchard v. Ely.

the tenant be evicted, a loss of custom may be taken into the account. *Id.* 91, 92. This latter rule was in some measure acted upon in the late case of *Briggs v. Dwight*, 17 Wendell, 71. There was a promise to demise a tavern stand at a day certain, which was refused by the promisor, after the promisee had broken up his former residence, and proceeded with a view to take possession. We allowed to the latter, damages for removing his family and furniture; in this, following the case of *Ward v. Smith*, 11 Price, 19. In *Brackett v. McNair*, 14 Johns. R. 170, the broken contract was to transport goods from one place to another; and the increase of value in the goods at the latter place was allowed as damages; though even this principle of estimate seems to have been denied in the previous case of *Smith v. Richardson*, 3 Caines, 219. In another case, the plaintiff sued for stone delivered to be used in building a church, and the defendants claimed a recoupment, because they had not been delivered at the day. They insisted, among other things, on damages, by reason of their workmen lying idle for want of the material. The court did not deny the claim absolutely but held that the defendants, even if the delivery had been stopped, would have been bound to use diligence in keeping their workmen employed on other materials, to be supplied as soon as they could be procured; thus avoiding all unnecessary loss, and that the deduction must be governed with a view to that principle. *Miller v. Mariner's Church*, 7 Greenl. 51, 55. The unreasonable delay of workmen stood somewhat on the footing of unreasonably delaying the boat in this case, which the judge refused to allow, though he directed that damages might be due for taking the boat to a proper place, for being repaired.

But to go the length insisted upon by the defendants, would, I apprehend, transgress what the law should allow, even had the plaintiff, without fraud, tortiously broken the machinery of this boat, as by a negligent collision, in navigating his own boat. The profits of a voyage broken up, are constantly denied consideration, even in questions relating to marine trespasses. *The Amiable Nancy*, 3 Wheat.

Blanchard v. Ely.

546, 560, and the cases there cited. *La Amistad De Rues* 5 id. 385, 389. Of course I lay out of view, as do all the cases, that the transaction is accompanied with wanton outrage, fraud or gross negligence; the cases just cited from Wheaton, show that these are exceptions. And see *Merrills v. The Tariff Manufacturing Co.* 10 Conn. R. 384. The case of *De Wint, v. Wiltse*, 9 Wendell, 325, must, I think, have been regarded by this court as a fraudulent breach of a covenant to keep a ferry in repair, which materially benefitted the plaintiff's tavern. The defendant left it unrepared, in order to favor his own ferry. Therefore damages were allowed for loss of custom at the plaintiff's inn. Pothier, as before cited, maintains the same distinction. In *Nurse v. Barnes*, T. Raym. 77, the defendant, in consideration of £10, promised to demise a mill to the plaintiff, who laid in a large stock to employ it, which he lost, because the defendant refused to let him have possession. The jury were held properly to have assessed the damages at £500. Very likely it appeared that the breach of contract was committed to favor some particular interest of the defendant or his friend, though the case mentions a simple refusal to perform.

The case at bar, so far as I have been enabled to discover from the evidence, stands entirely clear of *fraud*. If some of the iron used for shafts was rotten, there is nothing going to fix knowledge, or that I see, gross negligence in the plaintiff or his superintendent. The extent to which the iron proved bad, was doubtful, though the jury were authorized to infer it was by no means all of a good quality. There is no proof, however, that such iron was used intentionally; and we ought not to infer that a fraud was committed by any one. No new trial can, therefore, be granted on any error of the judge.

Still, we think, complete justice cannot be done without the cause being submitted to another jury; for the plain inference is, that they totally disallowed any thing whatever for defects in the boat. The plaintiff's counsel make a computation by which they show that \$62 deduction was made; but even this assumes that interest ran on the bal-

 Orange Co Bank v. Dubois.

ance mentioned in the assignment, \$4524 66 from the first of May. This could not be so: All parties agreed that the boat was not finally completed till pretty well along in July, and she was accepted, subject to completion. At most, the interest ought not to run till after the job was finished. It is sufficient to say, we think there is a strong preponderance of evidence in favor of some deduction.

New trial granted, on payment of costs.

 ORANGE COUNTY BANK vs. DUBOIS.

A sheriff who holds an execution *against the property* of the defendant in the process, is not bound, *it seems*, to suspend proceedings on the production to him of an *insolvent's discharge* granted to the defendant; at all events, if he do so, he incurs the peril of an action against him, if the discharge be shown to be *void*.

In an action against a sheriff who under such circumstances suspended proceedings, and did not return the execution, and the jury found that the property of which the defendant was possessed *belonged to a third person*, and consequently that the plaintiff was not entitled to recover, the court *refused to grant a new trial*; although the verdict was not warranted by the evidence—it appearing that the sheriff on being served with the *discharge*, informed the plaintiff's attorney of the fact and desired his instructions; that no instructions were given; and that the defendant in the execution had become *insolvent*.

THIS was an *action on the case*, tried at the Ulster circuit, in May, 1837, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The suit was brought against the defendant as sheriff of the county of Ulster, for neglect of duty, in not bringing into court the amount of an execution, a *fi. fa.* put into his hands for collection in favor of the plaintiffs against D. S. Tuthill. The judgment upon which the execution issued was rendered for \$735 96, in May term, 1828, and the execution was delivered to a deputy of the sheriff 15th November, 1830, who within a few days thereafter made a levy upon property in the possession of *Tuthill*, to an amount amply sufficient to satisfy the execution. Pre-

Orange Co. Bank v. Dubois.

vious to this time, to wit, on 7th November, 1829, Tuthill had obtained a *discharge* as an *insolvent debtor* from all debts owing by him, (under the *two-third act*,) and in the inventory of his debts, presented to the commissioner, together with his petition, was included the debt of the plaintiffs. Tuthill apprised the deputy of those facts, and claimed that his property was not subject to execution for the satisfaction of debts from which he had been discharged. The deputy wrote to the attorney of the plaintiffs, who had issued the execution, informing him of the discharge, and requesting his instructions; desiring at the same time an indemnity, should he direct him to proceed, as without it he should not feel safe in so doing. No answer being received to this letter, all further proceedings under the execution were suspended by the deputy. On the trial of the cause the defendant set up two defences: 1. The discharge; and 2. That the property in possession of Tuthill, at the time of the levy did not belong to him, but that A. D. Soper was the owner thereof. The *insolvent discharge* and all the papers relating to the obtaining thereof was read in evidence, and the counsel for the plaintiff insisted, 1. That the discharge did not constitute a bar to this action; and 2. If an insolvent discharge was a bar to an action of this kind, that the discharge in this case could not so operate, as on the face of the proceedings it had been *fraudulently* obtained, and consequently was void; which questions were reserved by the judge to be decided *in bank*, if necessary. In relation to the other defence, much testimony was given. Soper claimed to hold the property under an assignment executed to him by Tuthill, on 4th September, 1830, and it was shown that Tuthill had become *insolvent*. The only question submitted to the jury was as to the *bona fides* of the assignment. The jury found a verdict for the *defendant*; thereby establishing the *bona fides* of the transaction and that Tuthill was *not the owner* of the property at the time of the levy. The plaintiffs ask for a new trial.

I. R. Van Duzer & J. A. Spencer, for the plaintiffs, who in support of one of the positions contended for by them,

Orange Co. Bank v. Dubois.

viz. that the sheriff was bound to proceed under the execution, notwithstanding the discharge, cited 8 Cowen, 65, 192; 18 Johns. R. 52; 1 Wendell, 32.

M. T. Reynolds, for defendant.

By the Court, NELSON, Ch. J. It appears to be well settled, in respect to the *privilege of the person* of the defendant from arrest, that the sheriff may take notice of it, and decline executing the process; but this is under the peril of showing, if prosecuted, that the exemption is well founded. Dougl. 671. 2 Black. R. 1190. 11 Johns. R. 433. If he does arrest, no action will lie against him. *Id.* I doubt whether this rule should be applied in respect to *process against property*, where the defendant has been discharged from the judgment under the insolvent laws. The defendant in the execution should, in such case, be driven to his motion for relief, as the delay in the application to the court can work no great injustice. But if the officer should be allowed to notice the discharge it should be under the risk of showing, if proceeded against by the plaintiff in the execution, a case that would entitle the defendant to have the process set aside.

I am aware that the discharge under the *two-third* act has been held conclusive on a motion to discharge from arrest on filing common bail. 1 Cowen, 50, and cases there cited. A different practice, however, prevails under the act of 1819, abolishing imprisonment for debt in certain cases. 1 Cowen, 226. But I do not believe we should apply the above rule to the case of an application to relieve the *property* from seizure by execution, on account of the discharge—the plaintiff should be allowed to question its validity.

Conceding the discharge in this case to be void, of which there cannot be much doubt, the question whether the property was even then subject to the execution still existed, and was properly submitted to the jury, under the peculiar circumstances of the case. I say properly submitted, because no objection is made to the charge. If the question had been between the plaintiffs and *Soper*, we might have been

Camden, &c. Transportation Co. v. Belknap.

inclined to interfere with the verdict; indeed, as between them it could not be sustained. But we cannot fail to see that the plaintiffs have, in some measure, been instrumental in producing a result of which they now complain, and upon which they seek to found their right to a recovery. The sheriff applied at once to the attorney for instructions when the discharge was produced, advising him of the fact, and requesting an indemnity if he desired him to proceed. It is not denied but that the letter was received, and no answer was given. The officer might well conclude that the plaintiffs did not intend to contest the discharge or seek to hold the property. They were not bound to give the indemnity, but they should, at least, have advised the sheriff of their determination, whatever it might be. The jury were justified in taking the most favorable view of the transaction for the defendant, as it would be unjust now to hold him accountable for the property after it has passed beyond his control, and the defendant in the execution has become bankrupt.

New trial denied.

THE CAMDEN AND AMBOY RAIL ROAD AND TRANSPORTATION COMPANY *vs.* BELKNAP.

Common carriers, who carry passengers and their baggage as well as merchandise, are answerable under their common law liability for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steam boats or other conveyances departing from the place where the baggage is deposited.

A notice of "all baggage at the risk of the owners" is no protection to common carriers.

A general exception to a charge delivered to the jury, does not bring up any particular remark made by the judge, or any omission in such charge, unless the attention of the judge was directed to the point at the time. All that will be done on such an exception is, that the general bearing of the charge will be examined, and if that is not plainly injurious, or if in any legal mode of putting the matter the verdict must necessarily be the same, a new trial will not be granted, although the charge may in some particulars be erroneous.

Camden, &c. Transportation Co. v. Belknap.

ERROR from the superior court of the city of New York. *Belknap* brought an action on the case in the court below against the company, as common carriers between New York and Philadelphia, for the loss of his baggage, being a trunk and its contents, of the value of \$300. The defendants pleaded not guilty. On the trial before *Ch. J. Jones*, it appeared that the company had two offices in the city of New York, the one at number 12, and the other at number 14, Washington street. In August, 1833, the plaintiff with his family arrived in the city of New York, in the steam boat from Hartford, Connecticut, between twelve and one o'clock in the day, on their way to Wilmington in the state of Delaware. The plaintiff immediately proceeded to the office (No. 12) of the company, for the purpose of taking passage that afternoon for Philadelphia by the way of Trenton, but was told by *Bliven*, a clerk and porter in the office, that he could not go that afternoon—that no boat left to go by the way of Trenton until the next morning at six o'clock. The plaintiff, intending to go in the next morning line, asked *Bliven* if his baggage, consisting of three trunks, would be safe in the office, and *Bliven* replied that it would—that he would put it under lock and key. The plaintiff requested *Bliven* to do so, and left the trunks in the office. About three o'clock in the afternoon of the same day the plaintiff returned to the office and found the trunks standing where he had left them, when he complained that they had not been locked up, and *Bliven* replied that he had been busy, but he would do it immediately. In the evening the plaintiff went again to the office and found two of the trunks where he had left them—neither of them having been locked up—the third trunk was missing. *Bliven* could give no account of this trunk, but said he supposed it had been taken away by mistake. The plaintiff then took away the two remaining trunks, and afterwards pursued his journey by another line of conveyance. There was a closet in the office where it was usual to lock up baggage. *Bliven*, who was sworn for the defendants, had no recollection of having seen the plaintiff until in the evening, when it was discovered that one of the trunks was lost. He said they were in

Camden, &c. Transportation Co. v. Belknap.

the habit of locking up baggage in the lock up room whenever any body requested it ; that he always considered himself bound to do so when requested ; that both deck and cabin passengers were in the habit of putting their baggage in that office. He was satisfied that he did not undertake to lock up the plaintiff's baggage : but in that he was clearly mistaken, as was fully proved by two witnesses. *Wyall*, a public porter, testified that he had frequently carried baggage to the office No. 12, where it was received and locked up—that there is always a man at the office to receive baggage, who locks it up—that they are in the habit of locking it up.

Ira Bliss, a witness for the defendants, testified that he was the agent of the company in the city of New York : that the office at No. 12 is only for the accommodation of passengers while waiting for the boats, and the other is the transportation office, where goods are booked, freight paid and receipts given. That there is a closet in No. 12 for the convenience of passengers, where their baggage is locked up if they require it ; that *Bliven* is at the office the principal part of the time, and has charge of the baggage ; he makes entries at the office and receives the *fare* from the *deck passengers*, but not from the *cabin passengers*, who pay on board ; that he has no power to make contracts of any kind. The witness said that he and all the agents of the company have express orders to make no contracts in relation to baggage ; that a notification in large characters, "*all baggage at the risk of the owners*," has at all times been fixed up in the office and on board the boats, and has been inserted in all the company's notices in the public papers ; that the agents have no power to bind the company for baggage in opposition to the notice ; that the passengers have free access to the baggage and full control over it in the office—it is delivered to them whenever they ask for it—that when brought to the boat the baggage is put in a crate, and the passengers still have free access to it.

The defendants moved for a nonsuit on the ground, 1. that this was a contract for a deposit which the company could not make by their charter ; 2. that they could make no such

Camden, &c. Transportation Co. v. Belknap.

contract for a deposit out of the state of New Jersey; 3. that the plaintiff was bound to prove that Bliven was the authorized agent of the company to make such contract; and 4. that if Bilven could make such contract to bind the company, the contract as proved was *nudum pactum*, and the loss complained of proceeding from *nonfeasance*, the action could not be sustained. The chief justice overruled the motion and charged the jury as follows—"that the defendants, as *common carriers*, if they received the plaintiff's trunks as the baggage of a passenger to be carried with him by their line, would, on common law principles, be answerable for the loss of the missing trunk; but that the *notice limiting their liability*, if it reached the plaintiff or came to his knowledge, controlled the common law rule, and protected them from responsibility, *unless* assumed by them to the plaintiff by contract, *or unless* usage and the permitted course of business and the practice of their office has been such as to establish that office in the consideration and belief of passengers and others having intercourse and dealings with it, and with the agents and servants of the defendants conducting it, as a place of deposit for the reception of the baggage of persons intending to take passage by their line, in the absence of the boat and until her arrival, and they; the defendants were chargeable on that ground with the custody of the trunk and liable for its loss. That proof of the actual personal knowledge by the passenger of the notice limiting the defendants' common law liability was not indispensably necessary; the circumstantial evidence might be such as to supersede the necessity of positive proof; but that the circumstances must be so strong and conclusive as to satisfy the jury, and leave no doubt on their minds that there was no positive proof of knowledge by this plaintiff of the notice, but that there was strong circumstantial evidence, and it was for the jury to judge of its sufficiency to satisfy them; that if they believed from the evidence before them that the notice was known to the plaintiff, then the defendants would be protected by it from their liability as carriers further than would be afterwards stated to them; otherwise they would be under their full common law liability.

Camden, &c. Transportation Co. v. Belknap.

That if the jury should be of opinion that the plaintiff was apprised of the defendants' notice limiting their liability, the next inquiry for them would be, whether the defendants, notwithstanding their protection under that notice, have made themselves responsible for the loss by an express undertaking for the safe keeping of the trunks, or by any implied engagement or obligation, created by or resulting from the course of their business as carriers, and the character they have allowed to be stamped upon their office as a receiving office or place of deposit for the baggage of passengers to go by their line. That the plaintiff insisted that the defendants were bound by the special contract of their agent to take charge of his trunks and safely keep them, and if the plaintiff's witnesses were to be believed, the agent did, though he denies it, enter into such an engagement with the plaintiff. But there was no sufficient proof of his authority to make such a contract for the principals; that on the contrary, in the view taken by the court of the evidence, he was not only not authorized, but expressly forbidden by his employers to enter into any such engagement; and his employment as an agent in that office by the defendants did not appear to the court to impart to him that authority. Such an agreement by him with the plaintiff, therefore, if made by him, did not appear to the court to be binding upon the defendants. The question consequently arose, whether the defendants, by the permitted course of their business as carriers, and the mode of conducting it by the agents at the office in question, had impressed upon that office the character of an office established or kept by them for the reception of the baggage of passengers intending to go by their line, to be kept by them until it could be taken on board the boat? and if this question is answered in the affirmative, then whether they were guilty of *such negligence* in the duty which devolved upon them in the premises as to render them liable for the loss. That it was in evidence that the agents and servants of the defendants did receive the baggage of passengers at that office in the absence of the boat, and when required did put the same in the inner closet and lock it up, without any notice, explanation or admonition at the time

Camden, &c. Transportation Co. v. Belknap.

that the same was to be otherwise or to any greater extent at the risk of the owners than it would be if on board the boat; and if the usage and practice of passengers to deposit, and of the defendants' agents and servants to receive and keep baggage intended for transportation with the passengers by their line, had been so general, uniform and long continued, as to cause that office to be considered and regarded as the receiving office or place of deposit established or kept by the direction or with the knowledge of the defendants, for the reception of the baggage of passengers intending to go by their line, and applying for passage in the absence of the boat, to be kept by the defendants' agent and servant, and locked up in the inner closet if required, until it could be put on board the boat; and that passengers acting upon this usage and the presumption and understanding on their part that the baggage so left was to be in the charge of the defendants; and if the jury should also be of opinion that the neglect to place the baggage of the plaintiff in the inner closet and to lock it up, as the agent was requested to do by the plaintiff, and leaving it in an exposed situation in the outer office, was gross negligence in the agents or servants of the defendants, then they should find their verdict for the plaintiff, otherwise for the defendants." The counsel for the defendants excepted to this charge, and the jury found a verdict for the plaintiff with \$300 damages. Judgment having been entered upon the verdict the defendants sued out a writ of error.

J. Anthon, for the plaintiff in error.

S. P. Staples, for the defendant in error.

By the Court, BRONSON, J. When the judge's charge is not confined to a brief statement of the points of law, but extends to a review of the whole case, any particular remark which may be deemed exceptionable should be pointed out at the time. The judge will thus have the opportunity of explaining, qualifying or correcting what he has said; and if he refuse to do so, the party will then have a pointed

Camden, &c. Transportation Co. v. Belknap.

exception, upon which his right to a review cannot be questioned. So too, where the judge lays down a number of legal propositions for the guidance of the jury, some of which are deemed objectionable, the party should specify at the time to which point in particular his exception is intended to apply. And where any matter of law which the party may think applicable to the case, has been omitted in the charge, the attention of the judge should be called to that fact, and he should be requested to give the particular instruction to the jury. Until this has been done the party has no just ground for complaint. And clearly, a general exception to the charge delivered, cannot raise any question about a mere omission to say something more, which was not mentioned on the trial.

These remarks will dispose of many of the objections which have been urged against this judgment. The single, general exception which was taken to the charge by the defendants below, cannot authorize a critical review of every particular remark which fell from the judge; nor will it warrant us in reversing the judgment because we may think that something was omitted, which might very properly have been included in the instructions to the jury. The most we can do on such an exception, is, to examine the general bearing of the charge, and if that is not plainly injurious to the party in some matter of law, the judgment must be affirmed.

I. But if the particular objections which have been urged in the argument had been taken on the trial, I should not think it necessary to inquire whether every part of the charge is in harmony with all the rest, and with the law of the land. This case does not call for such a review; for on the facts proved, and about which there was no controversy on the trial, the plaintiff below was, I think, clearly entitled to the judgment which has been rendered in his favor. Should it be conceded that the charge was in some points erroneous, still, if in any legal mode of putting the matter the verdict must necessarily have been the same, the judgment ought not to be reversed.

The notice which the defendants had given that they would not be answerable for baggage, was of no legal im-

portance, and must therefore be laid out of the case. *Hollister v. Nowlen*, and *Cole v. Goodwin*, 19 Wendell, 234, and 251. We may also disregard all that was said about an express contract for the safe keeping of the baggage, and about the authority of *Bliven*, or any other agent of the company, to make such a contract. The facts which remain, and about which there was not a particle of controversy, on the trial, are, that the defendants were common carriers between New York and Philadelphia, and that they carried passengers and their baggage, as well as merchandize. In conducting this business, the defendants, either for profit or convenience, or both, kept two officers in the city of New York; in one of which, (at No. 12 Washington street,) they were in the habit of receiving, and if requested, locking up the baggage of persons intending to take passage in the next boat that should depart. The plaintiff, intending to proceed on his journey by the next boat, delivered his baggage at this office, where it was received by *Bliven*, the defendants' servant or agent, with full knowledge of the purpose for which it was delivered. Now, I think it quite clear upon this statement, that the plaintiff's trunks were in the possession of the defendants, as common carriers, and that they were answerable, in that character, for the safe keeping of the property. The trunk was lost before the departure of the next boat. On these facts, and independent of any other contract, express or implied, for the safe keeping of the property, and without regard to any question of negligence, the judge would have been well warranted in instructing the jury that the plaintiff was entitled to their verdict. The defendants had the property in their possession as common carriers, and were answerable at all events for the loss, unless it was occasioned by the act of God, public enemies, or the fraud of the owner—neither of which was pretended.

The case was tried before we had formally refused to engraft upon our code the modern English innovation of allowing the carrier to limit his common law liability, by a notice brought home to the employer. Following the rule which for a time prevailed in Westminster Hall, the learn.

 Simonton v. Barrell.

ed judge instructed the jury, that the notice which the defendants had given, if it came to the plaintiff's knowledge, would protect the defendants from responsibility as common carriers. The judge was then led to inquire whether the defendants had not by contract, either express or implied, made themselves responsible for the safe keeping of the baggage in the office, as a place of deposit. There may, perhaps, be some difficulty in maintaining this part of the charge, if we assume that the judge was right at the outset on the doctrine of notice. But if we commence with the common law rule of liability, the residue of the charge is of no importance. Whether right or wrong, in the abstract, no injury has been done to the defendants.

Judgment affirmed.

 SIMONTON vs. BARRELL.

Where by a statute law of a state in which the judgment is rendered, the plaintiff is authorized to agree with the defendant after the latter is arrested on a *ca. sa.* that he may go at large without payment of the debt, and yet, that the plaintiff may subsequently proceed against such defendant *by a new execution or such other process as the nature of the case may require*; IT WAS HELD, that within the equity of the statute the plaintiff was entitled to *maintain an action of debt* on the judgment, where the defendant had departed from the state in which the judgment was rendered and had come to reside within this state.

An attorney who prosecutes a suit to judgment, has not power by virtue of his general authority to discharge a defendant from arrest on a *ca. sa.* without the actual payment of the debt.

ERROR from the superior court of the city of New York. Barrell sued Simonton and declared in debt on a judgment rendered in his favor against the defendant in a circuit court of the district of Columbia, held for the county of Washington. The defendant pleaded *nul tiel record, nil debet and payment*. Issues being joined, the cause was brought to trial, when the plaintiff produced an exemplification of the record of judgment and rested. The defendant produced another copy of the same record, *with entries upon it, subse-*

Simonton v. Barrell.

quent to the judgment, by which it appeared that the defendant had been arrested on a *capias ad satisfaciendum*, issued upon the judgment, and *discharged* from such arrest *by the attorney* for the plaintiff upon an arrangement for the future payment of the debt. The discharge was professed to be granted in pursuance of *an act of the legislature of Maryland*, and *without any express authority* from the plaintiff. The act of Maryland, passed in 1789, was produced, by which it is enacted, that when a defendant is arrested on a *ca. sa.* if the plaintiff with the consent of the defendant elects *not to call the execution* during the term to which it may be returned, it shall be lawful for him to proceed against any such defendant by a *new execution or such other process as the nature of the case may require*, in the same manner as he might have done if such defendant had not been arrested on the former writ of execution. Upon this evidence, the defendant contended in the superior court of the city of New York that he had sustained his *second* and *third* pleas. The court ruled otherwise, and the jury, by the direction of the court, found a verdict for the plaintiff. Judgment being entered on the verdict, the defendant sued out a writ of error.

S. Sherwood, for the plaintiff in error.

O. Bushnell, for the defendant in error.

By the Court, COWEN, J. There is no doubt that, at common law, the judgment would have been extinguished by the consent of the plaintiff, on whatever terms, to discharge the defendant from this arrest. But it is equally well settled that the attorney for the plaintiff has no power to allow a discharge in virtue of his general authority, without the actual payment of the money. *Kellogg v. Gilbert*, 10 Johns. R. 220. In the case before us, so far from any special authority in the attorney being shown, the record shows affirmatively that he had none; and *that part* of the record too was given in evidence by the defendant below.

But take it that the plaintiff himself had signed the stipu-

 Simonton v. Barrell.

lation for a discharge, there can be no doubt that this action, was maintainable within the statute of *Maryland*. The argument against that is founded on the words of the act which, indeed, expressly gives the plaintiff a remedy only by farther execution or other *process*, which latter word may in strictness be confined to a *scire facias*. It is enough to say the statute is remedial, and that its equity, therefore, extends to an action of *debt also*. It has been held that a statute giving a remedy against executors extends to administrators, because both are in *pari ratione*. A defendant leaving the jurisdiction of a state wherein judgment is obtained against him, on action of debt, the only remedy remaining is equally within the reason which gives an execution or a *sci. fa.* at the hands of a domestic tribunal. It would be an outrage upon the intent of the legislature, to say that the defendant could evade the act by stepping over the line at which the laws of *Maryland* cease to operate. The act gives no remedy to the executors or administrators of the plaintiff. Suppose he had died; would all remedy have died with him? Such would be the effect of the strictness contended for. Numerous cases are collected in *Dwarris on Statutes*, 718, 721, wherein remedial acts have been extended to cases and persons not within the words; and many decisions noticed there, will be found to have carried the equity beyond the words in cases much less plainly within the general meaning. A provision against fraudulent *feoffments* was extended to fraudulent grants, fines, recoveries, and all other conveyances. A statute giving a writ of entry *in casu proviso*, was held extended by equity to a writ of entry *in consimili casu*. A statute gave remedy to a reversioner; by equity it was held the same remedy in a like case should be extended to a remainderman; and an act forbidding the warden of the fleet to let prisoners in execution go out of the prison was extended, to all other jailers in the kingdom. The statute which gave to executors an action of *trespass de bonis asportatis in vita testatoris*, is a familiar instance. It has been extended by equity to every injury which, during his life, tended to subtract from the personal estate of the testator; even to an action against

 Thorn v. Smith.

a sheriff for a false return, or removing goods after notice of rent due. 1 Williams' Ex. 511, 512, Philad. ed. 1832. It would be strange, after all this, if courts could feel themselves so fettered by words, as to say that a statute which gives a remedy by *scire facias*, would not extend to an action of debt. There is scarcely a difference even in form between the two; and none whatever in the substantial object. But allowing a new execution, is clearly enough to lay the foundation of a similar construction. The judgment must be affirmed.

Judgment affirmed.

 THORN vs. SMITH & WRIGHT.

A declaration by a *partner*, though made during the existence of a partnership, that a liability incurred by a third person, at his request, in the borrowing of a sum of money, was for the benefit of the firm, is not binding upon his co-partner.

Had a note been given in *the partnership name*, the rule would have been different; then the *onus* would have lain upon the co-partner to show that the note was given for the *individual debt* of the partner who gave it.

THIS was an action of *assumpsit* for money paid. The declaration contained the *money counts* only; Wright alone was brought into court. On the trial it was proved, that in *September, 1835*, the defendants were *partners* in the saddling business; which partnership has since been dissolved. Previous to the dissolution, *Smith*, one of the defendants, told a witness that he wanted to borrow \$100 *for the partnership*, and that he applied to the plaintiff to aid him in procuring the money; that the plaintiff told him to draw his note for \$200 that he would endorse it, and take one half of the sum for his own use. That a note was accordingly drawn and endorsed, which he (Smith) procured to be discounted, and that he paid one half the sum received to the plaintiff. When the note fell due, the plaintiff took it up. This witness further testified that the business was done in *Smith's name* and that *Wright* was not gene-

Thorn v. Smith.

rally known in the concern. The note was proved to be lost, but it was shown to have been a note *signed by Smith*, payable to the order of the plaintiff ninety days after date, and to have born date 3d or 5th September, 1835. The plaintiff claimed to recover one half its amount, with the interest thereof. The counsel for the defendant *Wright* insisted that the plaintiff was not entitled to recover; that the evidence did not sustain the declaration; that the plaintiff should have averred the *partnership*, or that the note was made *in the partnership name*; and that the declaration of *Smith*, made *subsequent* to the creation of the debt, was not sufficient to charge *Wright*. The circuit judge overruled these objections, and the jury, under his direction, found a verdict for the plaintiff. The defendant asks for a new trial.

M. T. Reynolds, for the defendant.

J. Holmes, for the plaintiff.

By the Court, NELSON, Ch. J. It was not competent for *Smith* by his declaration, even during the existence of the partnership, to change what on the face of the transaction appeared to be an individual debt, into a debt against the firm. The plaintiff did not suppose that he was dealing with the firm when he loaned his credit; but the contrary. The utmost length the cases have gone is to subject the firm, where the money has been borrowed by one of the partners expressly for the benefit of the partnership. 16 Wendell, 505. To sanction the principle contended for would enable a partner at any time to turn all his individual liabilities upon the partnership.

Had the note been given in the partnership name, a different rule might prevail. Then the *onus* would lie upon *Wright* to show that it was given for *Smith's* individual debt. No such fact is shown. What the *name of the firm* is, no where appears. If *Smith's name* alone constituted it, that fact should have been proved; and even then, I apprehend, it would have been necessary further to have

City Fire Ins. Company v. Corlies.

shown that the note, when given, was avowedly given *for the firm, and in that capacity*—the signature alone not necessarily indicating such facts.

New trial granted.

THE CITY FIRE INSURANCE COMPANY of N. Y. vs J. & H. P. CORLIES.

A *destruction of merchandize insured, by the blowing up with powder of a building in which it was stored*, under the direction of a chief magistrate of a city to prevent the spreading of a conflagration, was HELD to be a peril insured against in a policy against fire, and the insurers adjudged liable for the loss, where it appeared that the fire would have destroyed the building had it not been blown up.

The power thus exercised, though it should be admitted to have been illegally exercised, does not bring the case within the exception exempting the insurers from liability in case of loss arising from *usurped power*. The usurped power provided for in a policy means *a usurpation of the power of government*, and not a mere excess of jurisdiction by a lawful magistrate.

ERROR from the superior court of the city of New York. The plaintiffs in error were defendants below. The action was on a policy of insurance dated December 9, 1835, by which the company insured the plaintiffs for the period of four months and twenty-two days against loss or damage by fire, to the amount of \$3000, on earthen-ware in crates, contained in the brick, slated store No. 75 Pearl street, New York. In the declaration the loss was alleged to have happened, by and through the explosion of large quantities of gun-powder and by fire. On the trial it appeared that in the great fire, on the morning of the 17th of December, 1835, the store No. 75 Pearl street, was blown up with gun-powder, and the goods insured totally destroyed. The explosion was ordered by the mayor of the city, to arrest the progress of a fire then raging to the east of this store. The building next to the store, but not the store itself, was on fire, at the time of the explosion. The buildings all around this store, in every direction, took fire, and were more or less burnt or totally destroyed by the course of the flames; and according to every probability *the fire would have de-*

City Fire Ins. Company v. Corlies.

stroyed the store in question with its contents, had it not been blown up. The crates after they fell were consumed by fire. The defendants moved for a nonsuit on the following grounds :

1. The loss alleged did not arise from a cause contemplated by the policy, but was a remote consequence of the fire not necessarily arising from it.

2. The mere fact of bringing gun-powder upon the premises suspended the policy, although deposited without the knowledge of the plaintiff.

3. A loss by explosion of gun-powder cannot be said to be a loss by fire, and those cases in which a recovery can be had where the goods have been destroyed not by fire, but by water or by breakage or the consequences of the fire, are cases where the injury arose in the attempt to *save* the goods insured ; here the goods insured were intentionally *destroyed* to save the property of others.

4. The act was done by the mayor by virtue of his office for the benefit of the citizens at large, and the corporation of the city are liable for his acts even at common law independently of the statute ; if he had no authority, then his own was an usurped power, which is expressly excepted by the policy.

5. This fire was a general *calamity*, and property destroyed to put an end to it, should be a general tax on the citizens, and not a partial one on this insurance company ; and in a doubtful case the policy should be so construed as to lay a general rather than a partial contribution.

The *chief justice*, before whom the case was tried, denied the motion for a nonsuit, and charged the jury that the plaintiffs were entitled to a verdict. The defendants excepted, and the verdict and judgment having passed against them, they now bring error.

J. W. Gerard, for plaintiffs in error.

D. Lord, jr. for the defendants in error.

City Fire Ins. Company v. Corlies.

By the Court, BRONSON, J. I. There has, I think, been a loss by the peril insured against, within the meaning of the policy. In *Grim v. The Phœnix Ins. Co.*, 13 Johns. R. 451, no doubt seems to have been entertained, either by the court or counsel, that a loss by the explosion of gunpowder was a loss by fire. And in *Waters v. The Merchants' L. Ins. Co.*, 11 Peters, 213, the point was so adjudged. The court was of opinion, that fire was the proximate cause of the loss.

II. According to the terms of the policy, if the building was used for the purpose of *storing* gunpowder, the contract was, for the time, suspended. And see *Duncan v. The Sun Fire Ins. Co.* 6 Wendell, 498. But placing gunpowder with a lighted match in the building, for the express purpose of producing an explosion, which immediately followed, was a very different thing from what the parties contemplated when they inserted this provision in the contract. Whether the insurers are liable for this voluntary destruction of the property, is a question yet to be considered. But I think it quite clear that they have not established the allegation that the building was used for the storing of gunpowder.

III. The building containing the goods was destroyed by order of the mayor of the city, for the purpose of arresting the progress of a conflagration. Are the insurers answerable for this voluntary destruction of the property? This question has been presented in a double form—the one supposing that the mayor acted with, and the other that he acted without, authority.

1. Let us first assume that the mayor acted illegally. If the fire had been kindled by an incendiary, it is not denied that the insurers would be answerable. Why are they not then answerable, if the mayor acted without authority? The act, though not done for a wicked purpose, was as illegal as though it had been the work of a felon. The answer attempted is, that although the mayor had no authority, yet as he acted *colore officii*, this is a case of loss happening by means of *usurped power*, which is expressly excepted by the policy.

City Fire Ins. Company v. Corlies.

It is impossible to maintain that a mere excess of jurisdiction by a lawful magistrate, is the exercise of an usurped power within the meaning of this contract. That is not what the insurers had in mind when they made the exception. It was an *usurpation of the power of government*, against which they intended to protect themselves. Such was the interpretation given to the same words in a policy as early as the year 1767. *Drinkwater v. The London Assur.* 2 Wils. 363. The property insured was destroyed by a mob, which arose on account of the high price of provisions; and the insurers were held liable, notwithstanding a proviso in the policy that they would not answer for a destruction by "usurped power." Bathurst, J. said, those words, according to the true import thereof and the meaning of the parties, could only mean an invasion of the kingdom by foreign enemies *to give laws and usurp the government*, or an internal armed force *in rebellion, assuming the power of government*, by making laws, and punishing for not obeying those laws. Wilmot, Ch. J. said, the words meant an *invasion* from abroad, or an internal *rebellion, when armies are employed to support it*; when the laws are dormant and silent, and firing of towns is unavoidable. In *Langdale v. Mason*, 2 Marsh. Ins. 791, it was said by Lord Mansfield, that these words were ambiguous, but they had been the subject of judicial determination; that they must mean *rebellion conducted by authority*—determined rebellion, *with generals who could give orders*. And he added "Usurped power takes in rebellion, acting under usurped authority." Whatever doubt there may have been originally about the meaning of the words "usurped power," in a policy, their legal import had been settled long before this contract was made; and we cannot assume that these parties used the words in any other than their legal sense.

2. But the mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common law power, as the chief magistrate of the city, to destroy buildings, in a case of necessity, to prevent the spreading of a fire. Indeed,

City Fire Ins. Company v. Corliea.

the same thing may be done by any magistrate, or even by a citizen without official authority. *The Mayor of N. Y. v. Lord*, 17 Wendell, 285.

IV. If the mayor acted by lawful authority, it is then said that the property was destroyed for the benefit of the city, and that the corporation (not the insurers) must bear the loss. This case does not fall within the statute charging certain losses on the city, because it does not appear that the mayor had "the consent and concurrence of any two aldermen," 2 R. L. 368, § 81; and for the further reason, that the property would have been consumed by fire, if its destruction had not been ordered by the magistrate. *The Mayor of N. Y. v. Lord*, 17 Wendell, 285. It is said that the corporation is liable at the common law for the acts of the mayor: but no authority was cited in support of the position, and I am not prepared to say, that in a case like this, the doctrine can be maintained. The inclination of my mind is strongly the other way.

But suppose the city is liable, I do not see how that fact can affect this contract. If the insurers pay the loss, they may, perhaps, have an action against the corporation of the city, in the name of the assured, to recover back the money. *Mason v. Sainsbury*, 2 Marsh. Ins. 794; 3 Doug. 61, S. C. But however that may be, the fact that the assured may have a remedy against the city, cannot change or qualify the undertaking of the insurers.

This leads me to notice a little more particularly the extent of the contract. The company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far, there is no limit or qualification of the undertaking. If the loss happen *by fire*, unless there was fraud on the part of the assured, which is not pretended in this case, it matters not how the flame was kindled. Whether it be the result of accident or design—whether the torch be applied by the honest magistrate, or the wicked incendiary—whether the purpose was to save a city, as at New York, or a country, as at Moscow—the loss is equally within the terms of the contract. That the insurers intended the general undertaking should extend to every

Harker v. Anderson.

possible loss by fire, is evident from the fact, that they afterwards proceed to specify particular losses by fire for which they will not be answerable. *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507. The exceptions are contained in the sixth condition of the proposals annexed to the policy. It is unnecessary to recite the clause, because it is not pretended that this case comes within any of the exceptions, save that relating to a loss happening by means of "usurped power," and that point has already been considered.

There has then been a loss by fire. The case falls within the general undertaking of the insurers, and is not affected by any of the exceptions which they thought proper to make to the extent of their liability. We cannot add another exception. The insurers are bound by their contract.

Judgment affirmed.

HARKER vs. ANDERSON.

An action does not lie on a *bank check* against the *drawer* until *after notice* of presentment and non-payment.

What degree of *diligence* is necessary on the part of the holder in making presentment and giving notice of non-payment, *quære*.

The law in relation to *bank checks* examined and various *cases* and *dicta* in which such instruments are said to be distinguishable from *bills of exchange* cited and commented upon by Mr. Justice COWEN.

ERROR from the New York common pleas. Anderson sued Harker on a *check* drawn by the latter on the *Lafayette Bank* for \$140, dated 10th August, 1835, payable to bearer. He proved the *presentment* of the check at the bank and the non-payment thereof. This suit was commenced on the 12th August, 1835. The plaintiff having rested on the above proof, the defendant moved for a *nonsuit* on the ground of want of notice of the non-payment of the check. The presiding judge refused to grant the motion, and the jury, under his direction, found a verdict for the plaintiff. The defendant having excepted to the decisions made against him, sued out a writ of error. The case was very fully dis-

Harker v. Anderson.

cussed ; but as the cases cited and arguments submitted, especially those on the part of the defendant in error, are examined in detail in the opinion delivered on the decision of the case, it is deemed unnecessary here to state them. The case was argued by

P. S. Crooke, for the plaintiff in error.

J. R. Whiting, for the defendant in error.

By the Court, COWEN, J. A check is a bill of exchange payable on demand. FIRST, it is a *bill of exchange*. In *Boehm v. Sterling*, 7 T. R. 419, 426, Lord Kenyon said there is no difference between bankers' checks and bills of exchange, and the same rules apply to both. In *Cruger v. Armstrong*, 3 Johns. Cas. 5, 7, 8, Radcliff, J. said, "It possesses all the requisites of a bill." Kent, J. said, "Checks are, substantially, the same as inland bills, payable to bearer." In *Merchants' Bank v. Spicer*, 6 Wendell, 443, 445, Marcy, J. said, "Checks are considered as having the character of inland bills of exchange." In *Murray v. Judah*, 6 Cowen, 484, 490, Sutherland, J. said, "A check is in form and effect a bill of exchange." These are not merely *dicta* ; they were carried, by the cases cited, into their legal consequences. Checks were said to be governed by the same rules as bills of exchange ; that, accordingly, they *prima facie* belonged to the holder, might be declared on as bills, were admissible in evidence under the money counts, the drawee was first to be resorted to, and the drawer came in aid only, on the drawee's default. Therefore the check must be presented for payment, before the drawer could be made liable. These principles are also either directly held, fortified, or illustrated by the following among many other authorities : *Chit Jun. on Bills and Checks*, 24, Am. ed. of 1834. *Ellis v. Wheeler*, 3 Pick. 18. *Shrieve v. Duckham*, 1 Litt. 194. *Humphries v. Bicknell*, 2 id. 296, 299. *Mohawk Bank v. Broderick*, 10 Wendell, 304, 307. *M'Culloch's Dict. of Commerce, Checks*. 3 Kent's Comm. 74, 3d ed. *Woods v. Shroeder*, 4 Harr. & John. 276. A degree

Harker v. Anderson.

of confusion may arise from their being said to resemble, or be *like* bills of exchange, into which expression, as mentioned by Savage, Ch. J. in *Mohawk Bank v. Broderick*, some of the cases have run ; whereas they are *the bill itself* ; or rather, *bill* is the *genus*, and check is a *species*, just as a note on demand, or a banker's or goldsmith's note is a species of promissory note. Chitty, jun. 18. The law of presentment in respect to promissory notes is the same as that of checks, and is often resorted to as an illustration of the latter. Kent, J. in *Cruger v. Armstrong*, 3 Johns. Cas. 8, 9. See the cases collected in Bayley on Bills, Am. ed. of 1836, p. 224, 5, *et seq.* and the notes. Checks are also inaccurately called *in-land* bills. A check drawn at New York or Philadelphia is none the less so, for being a foreign bill, requiring the protest of a notary, in order to charge collateral parties. This places it more properly under the less restricted definition of Lord Kenyon, Radcliff and Sutherland, justices, as already given. M'Culloch, *ut supra*, says "they *nearly resemble* bills of exchange, except *they are uniformly payable to bearer*," as if the latter circumstance impaired the resemblance, or detracted from the attributes of a bill of exchange. He gives the form, which is nearly the same with that in Chit. jun. 24, 25, ed. before cited, and Chit. on Bills, 167, Am. ed. 1836. The words *or bearer* seem necessary only for the purpose of protecting the instrument against the stamp duty, Chit. jun. 25, 26, Chit. on Bills, 545, *Rex v. Yates, Ry. & Mood*. Cr. Cas. 170, (now commonly cited as 1 Mood.) *Conroy v. Warren*, 3 Johns. Cas. 259, 261 ; and do not seem to be otherwise essential to the definition. Chitty, jun. 24, says it is addressed to bankers ; but M'Culloch, *ut supra*, denies this to be essential. The draft in *Elting v. Brinkerhoff*, 2 Hall, 459, was neither negotiable nor addressed to a banker, yet Oakley J. thought it was to be considered as a check. Id. 463.

SECONDLY, it must be payable *on demand*. Accordingly, in *Brown v. Lusk*, 4 Yerg. 216, the bill in question, being payable at a certain day after date, was held not to be a check. This was on the authority of Chitty on Bills, 7th Am. ed. 322, who says, "Checks are not due before pay-

Harker v. Anderson.

ment is demanded, in which respect they differ from bills of exchange and promissory notes payable on a particular day." Id. 545, Am. ed. 1836. Their only peculiarities seem to arise from this circumstance. It may be either express or by legal implication, which always attaches payability on demand to bills or notes, where no time or conditions are mentioned. Chit. jun. 26. Chit. on Bills, 410, and note. M'Culloch, *ut supra*, says they are payable on demand; but in the form given by him, and so of those in Chitty, sen. and jun. the check is a simple order to pay, without the words *on demand*.

Among the peculiarities of a bill payable on demand are the following: it is payable on presentment; acceptance is therefore out of the question. But marking and sending to the clearing house is considered as equivalent to acceptance. No days of grace are allowed, and it must be presented within a reasonable time. M'Culloch, *ut supra*. Chit. on Bills, 410, ed. before cited, with the notes. Chit. jun. 26, a. Presentment within a reasonable time is essential in order to charge the drawer or endorser, and it has been said, cannot be dispensed with under any circumstances, even where there is a want of funds. *Cruger v. Armstrong, ut supra*. *Edwards v. Moses*, 2 Nott & M'Cord, 433. Chit. jun. 31, a. In this, however, the books are by no means uniform. Chitty says it will be excused by whatever will excuse notice. Chit. on Bills, ed. before cited, 423. *Commercial Bank v. Hughes*, 17 Wendell, 94. It is a well established general rule, though not entirely unshaken by exception, *vid. Sage v. Rance*, 2 Wendell, 532, that where a condition is for a party's benefit, he can dispense with it by cutting off all moral possibility of performance. For this I refer to the cases cited by me in *Harrington v. Higgins*, 17 Wendell, 378. It is singular that the ceremonial of *presentment* should be required where it is apparent, and shown affirmatively, that no evil could possibly arise to the drawer from its omission. Such *possible evil* is the only reason for insisting on it, and I observe that it was dispensed with in one case where a party drew without funds. *Franklin v. Vanderpool*, 1 Hall, 78. The principle of the *Commercial Bank*

Harker v. Anderson.

v. *Hughes*, will, I think, warrant the same course, if the plaintiff shows that the defendant has withdrawn the fund.

It lies with the holder, I apprehend, as in all other cases, whether he seeks to charge drawer or endorser, to show that he has made a presentment within a reasonable time. Chitty, jun. 48, *a*, says the drawer as well as endorser, is to be considered as a surety, and entitled to claim the strict observance of the ceremony of presentment. *Vide id.* 31, *a*. The contrary was insisted on the argument; and *Mogadara v. Holt*, 1 Show. 317, 12 Mod. R. 15, *S. C.* with another case from Comberbach, were cited, to show that the drawer of a bill is, *prima facie*, the principal. But I think we shall see that we ought not to go back to Lord Holt, sitting in the reign of William and Mary, to test the exact qualities of a bill of exchange. The case cited would apply to the drawer of any other bill, as well as a check; thus overturning the adjudications and practice of more than a century. All the cases since Holt's time, not only require presentment, in order to charge the drawer as well as the endorser; but that the holder at the trial must, on his part either show it to have been made, or establish the circumstances which excuse it. Where it is to be made within a reasonable time, the holder must, in general, set about making it, the very next day after he receives the check, whether drawer or endorser is to be charged. The English books expressly put them both on the same footing. *Appleton v. Sweetapple*, Bayley on Bills, Am. ed. 1836, p. 226, note 46. *Bickford v. Ridge*, 2 Campb. 537. *M'Culloch, ut supra*. Chitty, jun. 26 *a*, 44, 50, 51 *a*, 52, and the cases there cited. Chitty on Bills, 410, 412. Denham, Ch. J. in *Boyd v. Emmerson*, 2 Adolph. & Ellis, 184. *Bodington v. Schlencker*, 1 Nev. & Mann. 540. 4 Barn. & Adolph. 752. *S. C.* I desire it to be remarked here, in reference to what I shall have to say of certain *dicta*, that in the case last cited, the law of presentment of a check, in order to charge the drawer, was distinctly held to be the same as if the presentment had been made in order to charge the endorser, viz. that it must, unless some excuse be shown for the delay, be presented, at farthest, the very next day after the creditor re-

Harker v. Anderson.

ceives it. No doubt the time of presentment may be modified by circumstances ; and among these several American cases have held that a check being drawn on a bank, having no funds of the drawer to meet it, excuses an immediate presentment, as well as where the funds are subtracted by the drawer, intermediate the date and presentment. *Conroy v. Warren*, 3 Johns. Cas. 259. *Murray v. Judah*, 6 Cowen, 484. *Eichelberger v. Finlay*, 7 Har. & John. 381. *Franklin v. Vanderpool*, 1 Hall, 78.

A great struggle was made at the bar, mainly on the authority of certain *dicta*, almost entirely to withdraw checks from the rules applicable to other bills of exchange. A remark fell from Mr. Justice Sutherland, in *Murray v. Judah*, which has been understood by judges in several subsequent cases, and perhaps justly, as recognizing a remarkable exception. After insisting in the broadest language, that a check was in form and effect a bill of exchange, and laying down the rule that demand must be made in order to charge the drawer, he adds, that "as between the holder of a check and an *endorser* or third person, payment must be demanded within a *reasonable time* ; but as between the holder and maker, or drawer, a demand at *any time before suit brought*, is sufficient, unless it appear that the drawee has failed, or the drawer has in some other manner sustained injury by the delay. These principles are recognized and established by this court in *Gruger v. Armstrong*, 3 Johns. Cas. 5, and *Conroy v. Warren*, *id.* 259." This distinction between *drawer* and *endorser* was, I perceive, afterwards repeated by Savage, Ch. J. in *Mohawk Bank v. Broderick*, 10 Wendell, 306, and by Oakley, J. of the superior court of the city of New York, substantially, in *Cromwell v. Lovett*, 1 Hall, 68 ; and more distinctly in *Elting v. Brinkerhoff*, 2 Hall, 463. Marcy, J. in *Merchants' Bank v. Spicer*, 6 Wendell, 445, seems slightly to hint at the distinction, though at the outset of his opinion, he repudiates it, and lays down the rule as it is undoubtedly established by direct authority, mercantile practice, and all the writers on commercial law. He says, "checks are considered as having the character of inland bills of exchange, and the holder, if he would pre-

Harker v. Anderson.

serve his right to resort to the *drawers* and *endorsers*, must use the same diligence in presenting them for payment, and in giving notice of the default of the drawee, that would be required of him as the holder of an inland bill." That this is the undoubted rule, I again refer once for all, to *Bedington v. Schlencker*, as before cited, and other books which I mentioned in connection with it. The same learned judge, however, who first suggested the distinction, repeated it again in the late case of *Gough v. Staats*, 13 Wendell, 549. It is also repeated upon the same authorities, except the last, by Chancellor Kent. 3 Kent's Comm. 87, 3d ed.

The only way to account for the apparent anomaly thus raised and repeated, is by supposing that as the original remark was entirely *obiter*, except in its premises, viz. that a check is a bill of exchange, the distinction was hastily drawn as the result of the cases cited in its support. They certainly allowed that the plaintiff may insist, as an excuse for delay, that the drawer had no funds, or had withdrawn them; but they went no farther. In *Conroy v. Warren*, one of them, which was an action against the *drawer* of the check, who had withdrawn his funds, Thompson, J. in delivering the leading opinion, admits, that even had the action been against an endorser, the plaintiff might recover, on showing that the defendant had sustained no injury by the delay; and he adds, that in the case then under consideration, the drawer having subtracted the fund, had furnished ground for an interference against his having sustained damage, and drawn the *onus* of proving actual damage on himself. Kent, J. put the case on the same ground. Both agreed that the check must, in all cases, be presented *within a reasonable time*, a compliance with which rule would, in general, require that it should be presented as soon as possible, under all the circumstances. The two cases together had gone fully to establish that the check was a bill of exchange, and that the plaintiff might excuse delay, though, in *Cruger v. Armstrong*, the delay was held to be fatal, notwithstanding the withdrawal of the fund. *Murray v. Judah* was itself also the case of the *drawer* not only wanting funds, but soliciting the very delay which he object-

Harker v. Anderson.

ed to on the trial. There was indeed nothing in the result of any of the cases cited incompatible with the doctrine applicable to other bills of exchange, which is equally, that the plaintiff may excuse a quick presentment, where the drawer either had no funds originally, or had himself got possession of them, or used them for his other purposes. The *onus*, however, still lies with the plaintiff, who may excuse himself, not by showing that the fund remains unimpaired and that the defendant may therefore obtain it, but by proof of some misconduct which rendered presentment nugatory. It is the drawer's business to keep the fund good. Doing so, the payment is complete, if the holder do not present the bill at the first reasonable opportunity; while it is quite unreasonable that the drawer should pay two debts, each of equal amount, with the fund, merely because the prior creditor happens to be a little dilatory. If left, it may be lost; the banker is bound to answer the draft, and is liable to an action at the suit of the drawer, if he refuse. *Marzetti v. Williams*, 1 Barn. & Adolph. 415. The endorser, it is true, stands in a situation which calls for immediate presentment; but on no better ground. He has a remedy over against the drawer, with damages, if you please; though this is doubtful, if the bill be inland. The drawer has the same remedy against his banker, with a clear right to damages. The endorser, should he subtract the fund in any way, would equally lose his objection that delay of presentment had intervened.

To say that the drawer shall be liable on a presentment at any distance of time, unless he can show special damage, has not been held by any case, any cited on the argument at least, since *Mogadura v. Holt*. This case, indeed, declares that the *onus probandi* of loss or damage lies on the drawer; and if he show none, he is liable. It certainly goes the whole length of the decision below in the case at bar. It dispenses both with presentment and notice as prerequisites to charge the drawer even of a foreign bill of exchange. It seemed to be cited with considerable confidence, and certainly not without plausibility, as crowning the *dicta* which have fallen successively from able judges of

Harker v. Anderson.

this and the superior court of the city of New York. The learned editors of Bayley on Bills, Boston ed., 1836, p. 229, note (o), very properly inquire, after citing the *dictum* in *Murray v. Judah*, "Why should not the same principle apply to the drawer of a common bill of exchange?" I will add, in regard to *Mogadara v. Holt*, that on its being cited before Abbott, Ch. J., A. D. 1823, *Hill v. Heap*, 1 Dowl. & Ryl. N. P. Cas. 57, 59, he answered, "The rule which has been referred to with respect to the proof of actual damage, and the presumption arising from the absence of such proof, cannot weigh with me now; because I find that it has been repeatedly contravened, and is now considered as exploded: and, as it seems to me, very properly so; because it is always to be presumed, until the contrary appears, that the drawer has effects in the drawee's hands, and that he will be damnified by an omission to present the bill at the drawee's." May I be permitted to ask, with the editors mentioned, Messrs. Phillips & Sewall, does not the argument apply even with greater force to common checks?

The remarks mentioned as having been made in this court and the superior court, since *Murray v. Judah* was decided, were all of them, like the original *dictum* on which they were founded, entirely *obiter*; and I should feel the greatest reluctance to question them, if they had not been clearly so. I have therefore examined their foundations, and must say something farther in respect to these and a single other incidental remark made in *Murray v. Judah*; all, I trust, in a spirit of becoming diffidence. I have thought the examination quite necessary, though not perhaps absolutely so, in reference to some very important consequences sought to be drawn from them on the argument of the case at bar. This court have never adjudged, as far as I can find, that there is any distinction as to the time of presentment, whether its purpose be to charge *endorser* or *drawer*. I entertain entire confidence that no such distinction can be reduced from those cases on which alone the dicta which I have noticed are founded. I will only add that those cases are no more than an application of the doctrine in *Bickerdike v. Bollman*, 1 T. R. 405, which was

Harker v. Anderson.

among the first cases, if it was not the very first, which held that drawing without funds, is a fraud, and takes away the title of the drawer to exact notice. We have seen that in *Franklin v. Vanderpool* this has also been extended to excuse presentment of a bill; in that case a check. The law there, 1 Hall, 89, was drawn from *Bickerdike v. Bollman*; and Mr. Justice Oakley gives the general rule with its qualifications. From these, it is obvious, that the cases upon the authority of which Mr. Justice Sutherland spoke, and the one in which he was speaking, stopped even short of the principle of *Bickerdike v. Bollman*. Instead of saying that presentment might be made at any time no matter how remote, the learned judges might with great propriety have said, not merely, that delay in presenting was excused, but, that the act was totally dispensed with. I confess myself quite too obtuse to distinguish between the man who sends out his check without funds at the time, either actual or legally potential, and the man who takes away the fund, which he has marked by that check in favor of an honest creditor. What man draws a check without making a note of it as the basis by which to regulate his subsequent drafts? And if he be so dishonest or heedless as afterwards to subtract the fund, is it hard to make him pay a debt with the very money which he had thus appropriated to its payment? No. He holds the cash thus wrongfully obtained, as money received to the use of the holder of the check. I must be allowed to object, especially since the decision in *The Commercial Bank v. Hughes*, to a qualification implied by one expression of Buller, J. in *Bickerdike v. Bollman*, that the withdrawal of the fund, after the bill falls due, is any way more honest in morals or law, than its original absence. In other respects, the law is certainly well laid down by him, especially the rule of evidence. Speaking of *Tindal and Brown*, tried before him at Guildhall, in which the jury erred because they supposed it lay with the drawer who was sued, to prove that, for want of notice, he had suffered by non-payment of an accepted bill, he said the *onus* lay on the other side—on the plaintiff; and went on to show that the *onus* lies equally with the plaintiff, if he had omitted notice of non-accept-

Harker v. Anderson.

tance, because "it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands;" the reason repeated since, as we have seen by Abbott, C. J. May I ask again, is the presumption less cogent, because the bill is payable on demand? because it is a check? Does not every reason conspire to keep the *onus* steadily on the same shoulders? It was supposed at the bar, that we were to infer fraud in the draft because the bank refused to pay it, and thus change the *onus*. It would be matter of regret if the general presumption of integrity could be impaired by the mere act or declaration of third persons, not under oath. The drawee has never been held to be the agent of the drawer, so far as to conclude or affect him on the question whether there be effects in the hands of the former; nor can we assent to that proposition.

The multiplication of anomalies in any branch of our jurisprudence is an evil, so far as they tend to perplexity and confusion in the application of general rules; and they are for this reason alone usually avoided, even though individual hardship may result from steady adherence to a rule. Above all should they be avoided where they do not even subserve the purposes of right in the particular case. The rule laid down by the learned judge in *Murray v. Judah* was perfectly correct when taken in its application to that case; and he might, without departing from just legal analogy, have said the drawer shall not, in a case like this, be excused even without any presentment, if he cannot prove that he has suffered by the omission. The drawer Judah had withdrawn all his funds, and tampered with Foote, the former holder, to delay presentment; and repeatedly promised to pay, knowing all the facts. Well indeed did the judge say that he had made himself a principal under the circumstances. But if he is to be understood (and this was insisted at the bar,) as going out of the case and saying that as a general rule, the drawer is the principal, he is entirely unsupported by the authorities which he cites. *Seymour v. Minturn*, 17 Johns. 169, is one of them. It decides that the maker of a note is *prima facie* the principal; and what Bayley J. said in *Claridge v. Dalton*, 4 Maule & Selw. 222, 3, the

Harker v. Anderson.

only other authority mentioned, rather admits the drawer to be a surety; but insists that giving time to the payee, would not, under the circumstances of the particular case, discharge him. He puts the relation between endorsers as a parallel case; and says that giving time to an endorser lower down on the bill, with a view to collect of one still lower, would not discharge prior endorsers. It is, therefore, not analogous; unless it be shown that an endorser is, *prima facie*, a principal. Such are the only references made by the judge, for the position which, it was supposed on the argument, he took in *Murray v. Judah*. The extent to which that position is now sought to be applied would cover all bills; for *Claridge v. Dalton* was the case of a common bill of exchange payable at two months. I agree that the learned judge was right in reasoning as he did, from the doctrine of bills generally to checks. What is that doctrine? In *Clark v. Devlin*, 2 Bos. & Pul. 263, 366, Chambre, J. said, the acceptor is to be considered as the principal debtor, and the other parties as sureties only. In that case the drawer was insisting that he should be discharged, because the holder had given time to the acceptor; and the whole court held that he should, had he not himself assented to the delay. I adverted to this question in a general way before, but will make one or two additional quotations. Chitty sen. says, "The acceptor of the bill is primarily liable, and the drawer and endorsers may be considered in the nature of *sureties* for his acts." Chit. on Bills, 443, Am. ed. 1836. Chitty, jun. says, "Upon the ground that they are *sureties* only, the *drawers* and *endorsers* of a *bill* or *check*, and the *endorsers* of a note are entitled, as *sureties*, to claim the strict observance of the ceremony of presentment to the acceptor, *drawee* or *maker*." Chit. jun. 48 a. Am. ed. 1834. Is a drawer the less a surety before the bill is accepted? Suppose he agrees to give time to the drawee without acceptance; as if he were to tell the drawee, the banker, to credit the check; would not this equally discharge the drawer? None of the collateral parties, unless they come by way of accommodation, are *sureties* in the strict sense of the word. The endorser has received value, as well as the drawer. But they are all re-

Harker v. Anderson.

garded as *quasi* sureties ; as guarantors, upon the condition that the fund shall first be resorted to in the hands of the drawee. They are sometimes called *collateral parties* ; no matter what, so long as they are not the principals. *Claridge v. Dalton*, cited in *Murray v. Judah*, and on which the *dictum* we are considering was mainly founded, presented the relation of drawer and acceptor, yet was applied to that of drawer and drawee. Mr. Selwyn, in his *Nisi Prius*, 1 vol. Am. ed. of 1839, p. 363, says of the acceptor, although he undertakes to pay the debt of the drawer, yet is he primarily liable ; for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only collateral, yet he may be considered as the principal debtor, and the remaining parties as sureties only. These remarks are obviously applicable as well to the drawee before acceptance as after. He holds the fund, and must be resorted to primarily. This is not disputed by any case or *dictum*. But I do not pursue the argument ; for if the drawer of a check be the principal, it is impossible to say that the drawer of any other bill is not so. He clearly is entitled to the benefit of immediate presentment. We have seen how a contrary doctrine was treated by Ch. J. Abbott ; and I trust that no court, at this day, can think of retrograding to the twilight doctrine of bills in the age of *Mogadara v. Holt*. The cases of that age are the only ones I have seen which treat the drawer as any other than a collateral party.

All the cases agree that immediate notice to the *drawer*, of presentment and non-payment of *bills of exchange*, is essential to a right of action against him.

We come now directly to the question on which the court below passed. Is notice of presentment and refusal to pay a check, necessary ? I trust we have seen clearly, that a check is a *bill of exchange*. *A priori*, therefore notice should be given. The drawer was sued in the case at bar, and no want of funds was shown in the hands of the drawee. Does positive authority make an exception ? I have been through with the cases cited at the bar, and have looked into several others ; and so far from finding any adjudica-

Harker v. Anderson.

tion or *dictum* that a drawer may, under such circumstances, be subjected without notice, except that in 1 Hall, 68, I have found many books requiring it to be given. I will cite from a few. The two Chittys were quoted on the argument; Chit. on Bills, 465, Am. ed., 1836, and Chitty, jun. 44, Am. ed., 1834; both lay down the rule that notice must be given. They do not cite cases for what has not, I presume, been seriously questioned since Holt's time; but I suppose they advance the rule as a most obvious corollary from what cannot be disputed, that a check *is a bill of exchange*. Chitty jun., says, "When the drawer has endorsed and delivered a check to a third person for value, he is placed, in substance, in the position of the drawer of a bill or endorser of a note." Speaking of presentment, at the same page, he says, "it is indispensable, to fix the drawer of the check with liability, and he is also entitled to *due notice of dishonor*." In *Eichelberger v. Finley*, 7 Harr. & Johns. 381, the court assumed this, and labored to prove that notice was excused, because the defendant, who was drawer of the check, had no funds in the bank to which it was directed. In *Lilley v. Miller*, 2 Nott & M'Cord, 257, the same course was taken. In *Mohawk Bank v. Broderick*, 10 Wendell, 306, Savage, Ch. J. said, if the action be against the drawer of the check, and he have no funds, &c., he cannot object the *want of demand and notice*. In *Edwards v. Moses*, 2 Nott & M'Cord, 433, 435, it was attempted to excuse the usual steps to charge the drawer of the check, but it was not allowed. Richardson J. said, *demand* should have been made and *notice given*. In a like case, *Cathell v. Goodwin*, 1 Harr. & Gill, 468, Johnson and Gill contended that *notice* was not necessary, because excused. The court overruled the objection. In *Rickford v. Ridge*, 2 Camp. 537, Lord Ellenborough said, it is enough for the holder of the check to give *notice of dishonor* to those against whom he seeks his remedy. In *Woods v. Schroeder*, 4 Harr. & Johns. 276, notice of dishonor was given to the drawers, though they had withdrawn their funds beyond reach of their check and countermanded its payment. In *Cruger v. Armstrong*, so often before cited, Radcliff, J. said, the

VOL. XXI.

Harker v. Anderson.

want of funds may excuse the want of *notice*. In *Levy v. Peters*, 9 Serg. & Rawle, 125, 127, proof of presentment was dispensed with under special circumstances; but Tilghman, Ch. J., said, "In general there cannot be a recovery without proof of demand and *notice to the drawer*." All the cases I mention to this point were actions on checks, and most of them against the drawer. In *Franklin v. Vanderpool*, 1 Hall, 80, which was also against the drawer of a check, Oakley J., after showing that a check is a bill, adds, "The contract created between the *drawer* and payee is, that the bill shall be presented to the payee and payment demanded, and in case of non-payment that *notice thereof* shall be given to the drawer." It is true that, in *Cromwell v. Lovett*, 1 Hall, 68, he says that he cannot object the want of notice unless he also show that he had been injured by the neglect; but the remark admits that notice may be essential; and how far the right to it may be qualified, will be collected from what I have thought it my duty to say under another head, while inquiring into the general agreement between the rules which apply to checks and to bills of exchange as a class to which the former belong.

In going over the cases, it will be perceived that I have endeavored to anticipate, as far as possible, the grounds assumed by the counsel for the defendant in error, without taking them up and answering them separately. They were, that a check does not become a bill of exchange till it has been negotiated, it not being so as between drawer and holder, for which the *dictum* in *Murray v. Judah*, and corresponding *dicta* in other cases were cited; that the drawer is a principal, for which another *dictum* in *Murray v. Judah* and *Mogadara v. Holt* were cited, with a less pertinent case, *Sarsefield v. Witherly*, Comb. 152. The drawer was likened to the maker of a note payable on demand at a certain place, on whom it is said an actual demand is not necessary; but he must, at his peril, have funds there and be ready to pay and show this in his defence. *Huxton v. Bishop*, 3 Wendell, 21. *U. S. Bank v. Smith*, 1 Wheat. 175. It was added, that the bank having funds is liable in damages, if it refuse to answer the check. *Marzetti v. Williams*, *ut supra*.

Harker v. Anderson.

A further distinction between checks and bills generally was sought to be raised from *Rothschild v. Corney*, 9 Barn. & Cress. 388. The defendants had received the plaintiff's checks from one who had fraudulently obtained them of the plaintiff. The checks were passed to the defendants six days after their date. The plaintiff, therefore, contended, that so long a period having elapsed, the checks must be regarded as over-due; and the defendants took no title beyond that of the one who obtained them. None of the judges, except Littledale, J., mentioned any distinction in this respect between a check and any other bill. But he said, that though a party receiving a bill or note which is over-due, takes no greater title than the one from whom he receives it, the law he thought could not be applied to checks. It is remarkable that in the previous case of *Donon v. Halling*, 4 Barn. & Cress. 330, all the court concurred in holding that bills, notes and checks stand on the same footing in respect to this very point; and they intimated that if there were any difference, the check should be used the more speedily. Such a ruling on so short a delay, with us in respect to a bill, and especially a note payable on demand, would, perhaps justly, be deemed a very singular severity, after *Sanford v. Mickles*, 4 Johns. R. 224, and other cases. In that cited, the note had run five months, and yet this was held no such conclusive presumption of dishonor that the endorsee was bound to regard it. It was, however, a case presenting peculiar circumstances, and cannot be relied on as furnishing a general rule.

I will barely add a single remark from a writer, whose book is devoted more directly than any other to the consideration of checks: "Instead of presenting a negotiable bill, note or check for payment," says Chitty, junior, "the holder may, within a *reasonable time* after he has received it, that is, within the time allowed for presentment, put the instrument into circulation. The transferee has the same privilege; and the prior parties will not be discharged, if the last endorsee or assignee make a due presentment. But the drawer and earlier endorsers might be discharged, if the instrument were kept in circulation through successive

Harker v. Anderson.

parties for a period, which, in reference to the nature of the instrument, and the course of business in similar cases, can be deemed unreasonable." Chitty, jun., ed. before cited, p. 52. I cite these remarks, in connection with others more immediately pertinent, to show that the differences between checks and other paper of the class to which both immediately belong, if there be any, are very few, at least in the estimation of English writers on commercial law. It is most strange, if indeed that law has, in the instance before us, so far deviated from its usual demands of promptitude and vigilance, as was supposed on the argument, that no sanction of the anomaly should be found in adjudged cases, or in books which treat of commercial usage on either side the Atlantic.

There is no pretence, on the proof, that the defendant in the case at bar had countermanded the payment of the check at the bank. But it is said that if notice were necessary, as a general rule, yet here is proof of a want of funds in the hands of the bank, which is to be collected thus: the drawee is the agent of the drawer, and therefore his refusal is evidence that he had no funds. I have particularly noticed this argument before. It would equally apply to any other bill, and at once overturn the necessity of notice to the drawer in all cases. Indeed, it will be perceived that the misfortune of most of the arguments for the defendant in error, is the proving of so much that we cannot adopt them, without encountering many of the best established and most salutary rules intended to govern the conduct of parties to this kind of commercial paper. The same remark will apply to another suggestion thrown out in the course of the discussion, though I believe it was not very seriously insisted on: that the commencement of this suit, which it seems followed the demand immediately, was itself a notice within the rule. Beside: the latter argument is involved in a vicious circle; it assumes that notice is necessary as the condition which entitles the holder to sue, but satisfies itself with notice by the commencement of a suit. It has, to be sure, been said, that in case of a precedent debt or duty, the commencement of the suit is a sufficient notice. It would have been

 Young v. Peck.

better to have said that no notice need be given, in such case, because the party must take notice at his peril. The rule has never been applied, except to satisfy the formal allegation of *licet sæpius requisitus*, which is in truth merely formal, and means nothing or next to nothing. It is asserting, at most, that the party had been *often requested* by the voice of his legal conscience addressed to himself; or adopting, with Adam Smith, a more lively personification, in the theory of moral sentiments, by the *man within* addressing the *man without*. Why not say the allegation, *licet*, &c. is surplusage, and therefore need not be proved?

In no view which I am able to take of the question, do I think the decision of the court below can be sustained. The judgment ought accordingly to be reversed, a *venire de novo* to issue from the court below, and the costs to abide the event.

The CHIEF JUSTICE and Mr. Justice BRONSON concurred in the opinion that the *drawer* was entitled to notice of the non-payment of the check; but they expressed no opinion as to the degree of diligence necessary on the part of the holder, in presenting and giving notice of the non-payment of the check.

Judgment reversed, and *venire de novo*.

 YOUNG vs. PECK.

In an action of ejectment for the recovery of lands, *alienage* of the plaintiff cannot be alleged as a bar to a recovery, although he was born in Scotland in 1769, and remained an inhabitant there until 1830, where it is shown that the *father* of such plaintiff was a resident of this country previous to and at the time of the *declaration of independence*, and remained here until his death, in 1829.

ERROR from the superior court of the city of New York. This was an action of *ejectment*, brought by the plaintiff (Mary Young) for the recovery of an undivided moiety of a house and lot in the city of New York, whereof her father James Knox, died seised in 1823. James Knox came to

Young v. Peck.

this country from *Scotland*, in 1774, leaving the plaintiff in Scotland, with his grandfather, his wife having previously died. He remained in this country from his first arrival until his death. The plaintiff was born in 1769; was married in Scotland, to *George Young*, probably previous to her coming of age. Her husband died about 1825; in 1830 she came to this country; and in 1834 commenced this suit. The property in question is held by the defendant as a tenant of the grandchildren of her father, by a second marriage, the children of a deceased son, the only child of the second marriage who survived his father. Besides the above evidence of *citizenship* of James Knox, it was admitted on the trial that he was a citizen of the United States prior to the year 1802, and so continued until his death. The court decided that the plaintiff was an *alien* at the time of the descent cast, and consequently was not entitled to recover. The plaintiff excepted and sued out a writ of error.

J. Anthon, for the plaintiff in error.

E. T. Payne & H Maxwell, for the defendant in error.

By the Court, NELSON, Ch. J. The case turns upon the construction to be given to the fourth section of the act of congress, passed April 14, 1802, which provides, "that the children of persons duly naturalized under any of the laws of the United States, or who previous to the passing of any law on that subject by the government of the United States may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

The father of the plaintiff (James Knox) arrived here before the declaration of independence, and adhered to this

Young v. Peck.

country; he was an original citizen, and is to be considered the same as native born. The plaintiff, therefore, comes within the literal terms of the last clause of the above section. She is the child of a person who was a citizen of the United States when the act of 1802 passed, and though born abroad, is to be deemed a citizen within its words.

It is, however, contended that by the true construction of the clause in question, the rights of citizenship are conferred only upon children whose parent or parents *were citizens at the time of their birth*; in other words that it applies only to the children of citizens born abroad after the parents became citizens of the United States. The act of 25 Edw. 3, which is said to have been passed to remove doubts as to the rule of the common law on the subject, required in terms, that the parents should be native born *at the time of the birth of the children*. The 7 Anne, ch. 5, was more general; but the 4 Geo. 2, ch. 12, explanatory of it restored the qualification. 2 Barn. & Cress. 779. Now if congress, while enacting a law upon the same general subject, and as we may presume, with these several acts of parliament before them, had intended a corresponding restriction of *citizenship of parents at the birth of the children*, it is remarkable that they should have omitted the use of words to be found therein distinctly expressing such an intent. The very omission affords some ground for distrusting the construction insisted upon. Besides, no distinction of the kind is to be found in the previous clause respecting children born abroad of naturalized parents. Those born before the act of naturalization, being under age at the time, are within the privilege, if residents on the 14th April, 1802, when the statute passed. *Campbell v. Jordan and wife*, 6 Cranch, 176. Thus, the children of *aliens*, no matter where born out of the United States, are made citizens by the act of naturalization of their parents; and this too, whether it took place under the laws of congress, or previously under the law of any state; with the qualification only of age and residence. Including those persons specially admitted to citizenship by the states before the adoption of the constitution, the class born and who may have re-

 Young v. Peck.

mained abroad down to 1802, virtually naturalized by that statute, must have been very large; perhaps as large as the class under the other clause, with the liberal interpretation we propose to give it; the several states having begun to admit citizens soon after their governments were organized.

The clause under consideration was intended to apply to the children of persons who were native born citizens; or, of persons who were here before the declaration of independence, and participated in its establishment; they constituted, therefore, the most meritorious class of citizens whose offspring were entitled to the liberal indulgence of the government; hence the very general terms used in contrast with the previous clause, and the omission of the restriction as to age and residence. It would have been an unnatural, as well as unjust discrimination, to have debarred those children of the privilege whose birth may have happened before our independence, or while their parents were in the act of achieving it; their claims upon the country, and to a participation in the property and affection of their parents, were as strong as those born after, and it must be conceded that *they* become citizens, and are entitled to inherit in whatever country they might be found. 17 Pick. 70. 5 Barn. & Cress. 771. 2 Kent's Comm. 52, 53.

It is further urged, that the act of 1802 requires both *father* and *mother* to be citizens, in imitation of the 25 Edw. 3. The 4 Geo. 2, only requires the *father* to be a native born subject. "Children of persons," are the terms used in both clauses of the section, and do not necessarily embrace both parents. Taken distributively, they may well mean the children of any and every person *duly naturalized, &c.* or as in the second clause, *who now are, or have been citizens, &c.* I admit this view would carry the provision beyond what was probably the meaning of congress; as it would, in effect, naturalize the children born abroad, if either father or mother were citizens. The 25 Edw. 3, provided that the children, &c. whose *father and mother* should be of the faith and allegiance of the king, &c. be deemed natural born subjects. Under the construction of this act, its benefits were extended to children born abroad, though

 Young v. Peck.

the *father* only was native born. Cro. Car. 601. Bacon's Abr. tit. Alien, 126. Viner's Abr. tit. Alien, a 2, pl. 21, and note. It is true, this construction, was questioned in *Doe, ex dem. Duroure, v. Jones*, 4 T. R. 300, but it seems to have been the prevailing exposition of the statute while in force, and the judges there regarded the subsequent act of 4 Geo. 2, which restricted the requisite parentage to the father, as a parliamentary exposition of the prior statutes. This view, at least, weakens the argument urged upon us, that the act of congress should be constructed to include both *father* and *mother*, in imitation of the 25 Edw. 3.

It is worthy of remark, also, that after the act of 1804, amending the naturalization laws, it would be difficult to maintain that both *father* and *mother* should be naturalized within the meaning of the first clause of the fourth section. That act declared, that if any alien who should have complied with the preliminary steps made requisite by the act of 1802, and died before he became actually naturalized, his *widow* and *children* should be deemed citizens. This very clearly shows that the naturalization of the *father* is the efficient cause of conferring the right upon the *children*; and will satisfy the first clause of the fourth section; and it seems naturally and reasonably to follow, that *his* citizenship is sufficient within the other. In confirmation of the correctness of this view, I may refer to the case of *Charles v. Monson and Brimfield Manufacturing Co.* 17 Pick. 70, which from the pleadings and facts must have involved the very point now under consideration. It was there assumed by the court that the *citizenship* of the *father*, brought the daughter, born in Canada, within the benefit of the act. And in *Campbell v. Gordon and wife*, 6 Cranch, 176, the *naturalization* of the *father* conferred the right upon his daughter, born in Scotland.

This conclusion dispenses with the other questions discussed in the case; for if the plaintiff is brought within the second clause of the fourth section, she is to be deemed a citizen to all intents and purposes, the same as if she had been born and continued to reside in this country. There is no limitation of age or residence annexed; nor any other

Otis v. Jones.

that can affect her. The privilege of citizenship conferred is absolute and unconditional.

Judgment reversed ; *venire de novo* ; costs to abide the event.

OTIS vs. JONES.

Where property is *wrongfully taken*, the subsequent appropriation of it by a sale under an execution in favor of the *wrong-doer*, will not save the party from answering in *damages* to the *full value* of the property.

Whether, if the property, after the original taking, had been seized and sold under an execution in favor of a *third person* against the *owner*, such fact might not have been shown in mitigation of damages, *quære*.

THIS was an action of *trover* for a pair of horses of the value of \$110, tried at the Clinton circuit in January, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The defendant, *Jones*, being the assignee of a note made by the plaintiff, *Otis*, and payable to one *Rodolphus M. Farnum* in boots and shoes, obtained an attachment *in his own name* from a justice of the peace against *Otis*, on which process, a constable took the horses in question from the possession of *Otis* and delivered them to *Jones* for safe keeping. This was in *April* or *May*, 1836. On the return of the attachment, *Jones* produced and declared on the note ; but as it was not negotiable, the suit, by advice of the justice, was discontinued, and *Jones* sued out a new attachment in the name of *Farnum* the payee of the note. On the return of this attachment, the justice inadvertently entered the suit and judgment on his docket as though *Jones*, and not *Farnum*, was the plaintiff, although all the papers showed that *Farnum* should have been mentioned on the docket as plaintiff. The judgment was for about seventy dollars, damages and costs. On the 27th May, 1836, an execution was issued on the judgment, naming *Jones* as the plaintiff, on which the horses were sold about the first of June, and purchased by *Jones* for \$39. After the return of this execution, the justice discovered the error in his docket, and corrected it by naming *Farnum* as plaintiff ; and on the

Otis v. Jones.

31st August, 1836, issued execution on the judgment as amended, on which the horses were again sold about the first of September, and again purchased by *Jones* for \$36. The constable testified that he took the horses by direction of *Jones*, and put them into his hands for safe keeping, where they remained from the time they were taken on the first attachment until after the return of the second execution, except that they were twice taken away by the constable to sell at auction. *Jones* made some use of the horses, but they were in better condition at the time of the last sale than they were when first attached. This suit was not brought until after the *second sale*.

The judge decided that the effect of the second sale, which was legal, was to mitigate the damages, and would prevent the plaintiff from recovering any more than nominal damages. The plaintiff excepted, and the jury, by direction of the judge, found a verdict in his favor for six cents. The plaintiff now asks a new trial.

A. C. Hand, for the plaintiff.

G. A. Simmons, for the defendant.

By the Court, Bronson, J. Assuming that the first and second attachments were both regular, still the sale of the horses in *June*, on an execution in favor of *Jones*, when there was no judgment to support the execution, was clearly wrongful, and a conversion of the property. *Reynolds v. Shuler*, 5 Cowen, 323. And besides, *Jones* was himself the purchaser at the sale, and held the horses about three months under this void title. It is impossible to deny that there was a conversion. Indeed it was so ruled at the circuit.

But the judge held that the second sale, which took place in *September*, and on the execution in favor of *Farnum*, was legal; that the effect of the sale was in mitigation of damages, and that the plaintiff was only entitled to a verdict for the nominal sum of six cents.

Assuming what we do not intend to decide, that the justice had in this case the power to amend his docket and

Otis v. Jones.

issue a new execution, and that the second sale was consequently legal, still I think the plaintiff has a right to complain of the rule of damages. He had been wrongfully deprived of his property in *June*—his right of action was then complete, and had the suit been brought at any time within the three months which elapsed before the second sale, it is admitted that he would have been entitled to recover the full value of the property. How has he lost that right? The statute of limitations has not run, nor has the plaintiff done any act whatever to bar or prejudice his claim. How then has he lost every thing but the mere form of a remedy? The argument is, that by the second sale, on legal process, the property has in effect been applied to the plaintiff's use, and therefore he ought only to recover nominal damages. The answer is, that a wrong-doer cannot discharge himself by any act of his own, without the assent of the injured party.

But suppose there was no tort in the case, and the question arose in an action of assumpsit. Although by means of the second sale the sum of \$36, for which the property was struck off, may have been applied to the plaintiff's use, by way of satisfying so much of his debt, yet as that benefit was conferred without request, it could create no legal obligation on the part of the plaintiff to refund, or in any other way account for the money. *Bartholomew v. Jackson*, 20 Johns. R. 28. If the defendant could not in an action recover the value of a benefit thus conferred on the plaintiff, he cannot do the same thing in another form, as by setting it off or using it by way of satisfaction in an action brought against him by the plaintiff. If this could not be done in assumpsit, it surely cannot be allowed in an action of trover.

By procuring a sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort, or take away the right to full compensation in damages. The case of *Hayward v. Seaward*, 1 Moore & Scott, 459, does not proceed on the ground that a tort can be cured by a tender without acceptance, but on the ground that there had been no conversion of the property. In the case of *Hammer v.*

 COLLINS v. ELLIS.

Wilsey, 17 Wend. 91, we had occasion to consider the effect, both of an offer to restore property which had been wrongfully taken, and of a subsequent sale of the property on legal process against the owner. We came to the conclusion that neither the tender nor the subsequent sale could in any way affect the remedy of the party whose property had been tortiously taken. It is true, that the owner in that case had commenced an action for the injury before either the tender or the sale was made. But that cannot alter the principle. We think the case of *Hanmer v. Wilsey* was rightly determined, and that it is decisive of the point under consideration.

Had there been a sale before suit brought, on legal process against the plaintiff in favor of some person other than the wrong-doer, that would have presented a question which we are not now called upon to decide. *Irish v. Cloyes*, 8 Vermont R. 30. In this case although *Farnum* was the nominal plaintiff in the second execution, the defendant *Jones*, was the real party. He owned the debt, and procured the rendition of the judgment on which the execution issued.

New trial granted.

COLLINS vs. ELLIS.

A person *prima facie* liable for the payment of a debt is *not* a competent witness to sustain a suit in which the debt or a part of it is sought to be charged upon a *third person*, or upon a *fund* in his hands; and it was *accordingly held* that in an action by a *workman* or *material-man*, under the acts giving a *lien* to mechanics and others for work done or materials furnished in the erection of buildings in the city of New York, against the *owner* of such buildings, the *contractor* to whom credit was originally given is *not* a competent witness for the plaintiff.

ERROR from the New York common pleas. Ellis sued Collins under the act for the better security of mechanics and others erecting buildings in the city of New York, commonly called the *lien law*, and the act amending the same.

Collins v. Ellis.

See Statutes. sess. of 1830, p. 412, and sess. of 1832, p. 181. Collins had entered into a contract with one John G. Young, whereby the latter engaged to do the carpenter work *according to a specified plan* of four houses then erecting by Collins in the city of New York, for which he was to receive \$3800 in certain specified instalments as the work progressed. Before the job was completed, Young abandoned the work, leaving an instalment of \$1000 unpaid. *Ellis*, the plaintiff below, having furnished Young, the *contractor*, with a quantity of *plank* used in the erection of the buildings, for which he claimed the sum of \$256 as due to him, gave *notice* of such claim to *Collins*, the owner of the buildings, and demanded payment of the same. The *notice of claim* was accompanied by an *account*, drawn up by *Ellis*, charging Young as debtor, specifying the quantity of plank and the value thereof, and two *affidavits*: one of *Ellis* himself, declaring the account to be just and true, and stating the amount due to him to be \$256; the other was made by a third person, who merely swore to the value of the plank. On the production of these papers on the trial, the defendant objected to their sufficiency, insisting that the statute required an *attested* account of the materials furnished and the value thereof, and that the papers produced did not amount to a compliance with the requirements of the statute. The objection was overruled. The plaintiff then called Young, the *contractor*, to prove a balance due to him from the defendant for work done on the buildings, over and above the payments received by him. He was objected to as not a competent witness, but the objection was overruled; and he then testified that the defendant was indebted to him over and above the payments received in the sum of \$232, for *extra work* upon the buildings, and that what remained to be done under the contract when he abandoned the job, would not cost a sum equal to the last instalment which remained unpaid. On the other hand, evidence was given tending to show that the cost of completing the job would greatly exceed the \$1000 and the sum claimed for *extra work*. The jury found a verdict for the plaintiff for the

whole sum claimed. The defendant having excepted to the decisions of the court, sued out a writ of error.

W. Mulock, for the plaintiff in error.

H. Brewster, for the defendant in error.

By the Court, COWEN, J. There is no foundation for objecting to the account, as not properly attested. This attestation was of course not evidence upon the trial. The object of the act, in requiring it, was to prevent the introduction of captious and unfounded claims against those who employ building contractors. It intended, therefore, that the plaintiff should sustain it by his own oath, as proof preliminary to the bringing of an action, like the proof of loss which is often required of the assured by policies of insurance. The section in question speaks of an *attested account* merely, without saying by whom. The attestation furnished was, therefore, a literal compliance with the terms, and I think, for the reason given, it was also in conformity with the intent of the act. I agree that it would have been otherwise, had the act contemplated the attestation being used as evidence of the truth of the account, upon the trial.

The question whether Young was a competent witness for the plaintiff, depends on the legal effect which a recovery in a suit of this kind will have upon the rights of the original debtor. The plaintiff had given credit to him; and at common law, he alone was liable; but the statute allows the creditor on serving an attested notice, to pass him by, and recover of another, if that other be indebted to him, in respect to the building, on which the plaintiff's labor has been bestowed. So far, Young was most clearly interested to make out a fund in the hands of the defendant below. It was to perform the important function of paying the witness' own debt. The defendant was called into court as being a debtor in respect to the fund; and a recovery by the plaintiff, with satisfaction, would work an extinguishment of the debt. Admitting the witness to be only *prima facie* liable for a debt, it has been often held that he is not competent

Collins v. Ellis.

to sustain a suit which seeks to charge that debt upon another: as if he had been an agent for the defendant to contract the debt for him, but had contracted in his own name, or without disclosing the name of his principal. *M^rBrain v. Fortune*, 3 Camp. 317. Lord Ellenborough said, in that case, that the verdict which he was called to sustain would be evidence for him, if the plaintiff for whom he was called should afterwards sue him as being *prima facie* liable. *Shiras v. Morris*, 8 Cowen, 60, is direct to the same point. The former case was approved by the judges of the common pleas in *Ripley v. Thompson*, 12 Moore, 55. In the latter case, the witness who had given his note to the plaintiff for the debt, was called to charge the defendant as his partner, but was rejected, because a recovery would relieve him from one half the debt. In *Brown v. Brown*, 4 Taunt. 752, also cited and approved in *Ripley v. Thompson*, by Gazelee, J. at p. 58 of 12 Moore, the court came to the same conclusion. There one who had suffered judgment by default in an action on a joint contract, was offered as a witness against the other, but excluded on the ground that the witness would obtain by his own testimony contribution against the other. The precise point decided in *M^rBrain v. Fortune* was decided in the same way by the district court for the city and county of Philadelphia in *Hickling v. Fitch*, 1 Miles, 208. There are many cases agreeing with the principle of *Ripley v. Thompson*, indeed deciding the very point, and some in this court. *Marquand v. Webb*, 16 Johns. R. 89, is one. There are a class of cases which conflict with this principle, or rather its application in the two cases just mentioned, on the notion that the witness would be liable over; and so a *balance of interest* created. Mr. Justice Nelson mentions two cases of this class in *Gregory v. Dodge*, 14 Wend. 603. They are *Cossham v. Goldney*, 2 Stark. Cas. 414, and *Blackett v. Weir*, 5 Barn. & Cress. 385. *Hudson v. Robinson*, 4 Maule & Selw. 475, was a third. Mr. Justice Nelson does not appear to be at all satisfied with the reason on which these cases proceeded.

Collins v. Ellis.

I have always thought the better reason with us to be, that a recovery, one way or the other, would discharge the witness, both at law and in equity, *Robertson v. Smith*, 18 Johns. R. 459, *Penny v. Martin*, 4 Johns. Ch. R. 567, which would throw his technical interest against the party calling him; for, by defeating the plaintiff's action, the witness would escape both present contribution and all future liability. That might be worthy of consideration, should the particular class of cases to which *Marquand v. Webb* belong come to be reviewed. But it does not touch the question immediately before us, because a recovery by the defendant could have no such operation, except where the witness is a *joint debtor* with the defendant. So far as this court has acted, we have direct authority for saying, that where the plaintiff calls a witness who is liable, or *prima facie* liable to the plaintiff for the debt in question, with a view to throw even part of that debt, and *a fortiori* the whole of it off himself, and on to another, the witness is incompetent. In such case, I do not know that the verdict, being admissible as evidence for or against the witness is essential. The result of the proceeding is a payment of his own debt, in part or in whole. Suppose an officer, having levied on a debtor's property, to be sued in trover for it by a stranger, and the debtor to be called for the officer; he would be clearly incompetent. Spencer, J., in *Marquand v. Webb*, 16 Johns. R. 93, 94. The record would in such case, perhaps be evidence of an eviction, if the plaintiff recovered; but the prominent reason is, that by the witness' own oath, he may swear a fund out of the stranger, which has been levied on to pay the witness' debt. He therefore has a direct interest. In the case at bar, Young was called to create a fund for his own benefit. The defendant below denied its existence. Suppose Young's debts had been assigned under the insolvent act, and his assignees had sued the defendant below for the \$232, I need not cite cases to show that he could not be a witness without his interest being first released. In cases of this kind, we must look at the nature of the question, the point really at issue; not merely to the technical form of the record, nor whether

Collins v. Ellis.

it will be evidence to affect the witness hereafter; though I think I shall be able to show that it would in one view affect Young most seriously. The question is broader: is he to be directly benefitted by the event of the suit. In the case at bar, he stood in the position of a plaintiff against Collins, who was warmly contesting the debt. Young had abandoned his contract, had forfeited the last instalment; and how much farther he had injured Collins, was the question submitted to the jury on his testimony. It is right in every sense, therefore, to say that the witness was the author of the fund which was to pay his debt. In *Hayes v. Grier*, 4 Binney, 80, the county treasurer had sued one to whom he alleged Bond had paid money to be paid over to him, the treasurer; and Bond was held incompetent as a witness for the plaintiff. Tilghman, Ch. J. and Yeates, J. both said the record would be evidence for Bond, to prove that the treasurer had recovered the money. Mr Mulock cited my Treatise, 593, on the argument, where I have given the substance of this case in a familiar way, and assigned the same reason. Whether that be the true reason or not, we see that the result would probably have been a satisfaction of the debt, and a consequent discharge of the principal debtor called as a witness to promote that discharge. This argument has thus often been applied, as we have seen, in actions on contracts, though I admit it has been as often repudiated in actions for wrongs. There, the joint wrongdoer not sued is held competent as a witness for either party, though his testimony goes in the result, when he is called for the plaintiff, entirely to discharge him. I say in the result, because, with us, he is not discharged till the plaintiff either obtains actual satisfaction, or, at least, by taking out execution, has elected *de melioribus damnis*. *Livingston v. Bishop*, 1 Johns. R. 290. In England, the simple recovery by the plaintiff bars all action forever against the witness. Yet, says Abbott, Ch. J. in *Blackett v. Weir*, before cited, "Scarcely a circuit passes without an instance of a person who has committed a trespass, being called to prove that he did it by the command of the defendant." He admits the objection to be much stronger than that on which *Mar-*

quand v. Webb and its kindred cases shut out the witness ; and *Blackett v. Weir* was, as we have noticed, in direct conflict with those cases. The principle is as strong against the competency of the witness, in the cases mentioned by Abbott, Ch. J., for aught I can see, as in *McBrain v. Fortune*, or *Ripley v. Thompson*. The only difference is, that one class are cases of *tort* and the other of *contract*. Yet no one can deny, that on the same principle, in the different cases, courts have uniformly come to antagonist results. I must be pardoned for supposing that the learned chancellor, in *Benedict v. Hecox*, 18 Wendell, 493, fails to make the two classes of cases consistent, by an attempt to show a stronger reason for exclusion in the case of contracts than of torts. Yet I agree, and have endeavored to show, that the authorities are quite uniform, both in England and in this country, that where the witness stands as a sole debtor for the whole debt, he cannot be received to charge it on another man, or on a fund in the hands of that man which his testimony goes to create, unless there be some counter-vailling interest upon which we can say *stat indifferenter*. See per Spencer, J. in *Marquand v. Webb*, 16 Johns. R. 94, 95. The following cases will also be found to sustain the same view : *Sheldon v. Ackley*, 4 Day, 458 ; *Rotheroe v. Elton*, Peake's N. P. Cas. 84 ; *The State v. Edwards*, 4 Dessaus. Eq. R. 1, 4, 5 ; *Emerton v. Andrews*, 4 Mass. R. 653, (though Spencer, J. in *Marquand v. Webb*, thought the interest of the witness in the last case was balanced ;) *Purviance v. Dryden*, 3 Serg. & Rawle, 402 ; *Miller v. M'. Clenachan*, 1 Yeates, 144 ; *Miller v. Hale*, Dudley, 119 ; *Whatley v. Johnson*, 1 Stew. 498 ; *Doebler v. Snavelly*, 5 Watts, 225.

I have found no cases, *in respect to contracts*, which are the other way, except two at nisi prius : one in England and one in Ohio. *Roucroft v. Basset*, Peake's Add. Cas. 199, and *Nicholson v. May*, 1 Wright, 660. I will not deny that there may be others, for I am prepared for almost any judicial discrepancy upon the principle which governs this class of cases, after what I have read as the solemn adverse conclusions from it, by the courts of Westminster Hall. I do not know that we ought to be surprised at such things

Collins v. Ellis.

on many questions which respect the competency of witnesses; for, I imagine, it would be easy to show that the cases in this branch of our jurisprudence are more difficult of reduction to scientific arrangement, than those in any other department of the law. I am confident, however, that we are bound by at least a decided balance of direct authority to deny the competency of a witness called to fix his own debt upon another.

But it was said that Young had an adequate counterbalancing interest on the other side. I admit, that where a witness is suspended between equally opposing forces, he is competent; and it must now be admitted, perhaps since *Benedict v. Hecox*, in the court of errors, 18 Wendell, 490, the case mainly relied on for the defendant in error, that if Young had, in the event of this suit failing, a perfect remedy over against Collins, the defendant below, unaffected by a recovery either way, he was a competent witness. And see the *note* in that case referring to *Gregory v. Dodge*, 14 Wendell, 593. This case, and I admit that it stands well supported by authority, though I shall not stop to go into the books; opens another door for reversing hundreds of decisions. Indeed I think special bail might be received under it, as a witness for his principal; certainly any other surety in behalf of his principal. In the case relied on, the action was by *Hecox*, a surety, against the alleged principals in a promissory note, for whom he had signed the note and paid the money; and to establish his demand by showing that the defendants were principals, he called another, one *Foster*, who had also signed the note with him as surety. Foster was held competent, although his testimony went to exonerate himself by fixing the debt on others, because he clearly had a remedy over against the principals, for whatever he stood liable as surety to pay by way of contribution to *Hecox*. If the party who called him succeeded, the witness was relieved; if he failed, the witness would be charged, but could come against those persons whom he was seeking to fix, for all that he would lose. This was holden to make him indifferent. If he lost any thing, it must be by the failure of his indemnitors, an event which was re-

Collins v. Ellis.

garded as too remote and contingent to work a technical influence. I refer to the argument of Chief Justice Nelson, while the case was in this court, 18 Wendell, 491, 2, and Senator Paige, at id. 504, 5, in the court of errors, and the cases cited by him, to show the view taken by the two courts respectively as to the opposite influences which were held to affect the witness. The case is a decision simply, that where the witness has a safe remedy over for what he may lose by an event adverse to himself, of the suit in which he is called, this consideration renders him competent. If we look at the mere solvency of the man against whom the remedy is supposed to lie in the case at bar, it is so far within the doctrine of *Benedict v. Hecox*. If the plaintiff below had failed, the defendant was able to pay the disputed money to Young.

There is, I think, however, one remarkable feature in this case, which did not exist in *Benedict v. Hecox*. Here it was essential for the plaintiff below to show that there was a debt due from the defendant to the witness, Young, upon which the plaintiff's notice had attached; and, in virtue of the statute, worked an appropriation of the particular debt to the plaintiff. I think the event of the suit was the same in legal effect, to the witness, as if he had himself, in writing, assigned the debt to the plaintiff, and warranted its collection; or, if you please, the same as if it had passed by assignment under the insolvent act to the witness' assignees. In such case a privity arises, and it shall not be allowed, that those who have thus acquired the interest, and brought their action and been defeated on the merits, may re-assign an unimpaired claim, to the person from whom they received a transfer of it. An adverse event of a suit brought by a trustee or assignee, binds the *cestui que trust*, or assignor. There is a privity between them. The formal right of the plaintiff below was clear; he made out the assignment to him by evidence entirely independent of Young's testimony. Then, as standing legally in the place of Young, he proceeded to try the question whether the debt which he claimed had any existence. To show this was essential, *Haswell v. Goodchild*, 12 Wendell, 373; and was admitted to be so up-

Collins v. Ellis.

on the trial ; and Young, with all his ultimate responsibility resting upon him, was made a witness to that point. Suppose the action to have failed on this trial upon the very point, is it to be tolerated that Young may himself sue, and try the question again ? Is not his remedy forever gone in respect to the fund in question ? Clearly it is, unless he shall be enabled to show that the action was brought and tried collusively, in order to defraud him, or went off upon some point not connected with the merits. Nothing of that kind can be pretended in the present case. If the action had failed upon the preliminary proofs, it might have been renewed. But the debt was as effectually transferred as if it had stood in the form of a note or bill of exchange, and had been endorsed to the plaintiff below by Young ; at least, after a trial on the merits, he would have been as completely cut off by the event, as he would by the trial of a suit upon a debt regularly assigned and guarantied by him. The record would, therefore, be evidence against him. The debt would not, like an endorsed note, revert to him in his original capacity, on his paying the holder, in this case the mechanic. It would come loaded with the legal bar created while in the hands of the assignee. The answer to Young's action would be, that the suit by the plaintiff below, which failed, and the one brought by him, were substantially between the same parties ; or, at least, that he could claim only as a *privy* of the plaintiff below. These views will be found supported by the following cases : *Rogers v. Haines*, 3 Greenl. R. 362, 366 ; *Calhoun's lessee v. Dunning*, 4 Dall. 120 ; *Hutchins v. Fitch*, 4 Johns. R. 222 ; *M'Donald v. Rainor*, 8 id. 442. An assignee of a chose in action has often been considered the real party by this court ; *a fortiori* is he so, where the debt is transferred by law, and he empowered to sue for it in his own name ; Shall the one for whose benefit he sues, escape the same consequence ; More especially is a party in interest though not even named upon the record, concluded, if he have notice, and be present, as Young was, and participate in the prosecution of the suit. *Walker v. Ferren*, 4 Verm. R. 523, 529, 530. The fact of his being a witness on the trial, shows

Maxwell v. Palmerton.

that Young had notice. Per Savage, Ch. J. in *Brewster v. Countryman*, 12 Wendell, 450.

To allow a claim first to be litigated by the assignee, with the benefit of his assignor's testimony, and on failure, the debtor to be harrassed by another suit concerning the same matter, would be unreasonable, not to say oppressive.

Thus, that the record would be evidence against Young, on a recovery adverse to the plaintiff below, seems to be quite clear. He was interested to avoid that consequence.

The judgment of the court below must, therefore, be reversed ; *venire de novo* will issue from the court below ; the costs to abide the event.

MAXWELL vs. PALMERTON.

In an action of *trespass* for killing a *dog*, where the defence was that the dog was *ferocious* and in the habit of attacking individuals, *it was held*, that it was not necessary to prove a *scienter* as to the plaintiff, to support the defence.

ERROR from the Saratoga common pleas. Maxwell sued Palmerton in a justice's court in an action of *trespass* for killing his *dog*. The defendant proved by several witnesses that the dog was ferocious, had repeatedly made attacks upon sundry persons, and was looked upon as dangerous. Several of the witnesses who gave instances of the bad conduct of the dog, also expressed their *opinions* that they considered him a dangerous dog ; which expressions of opinion were objected to by the plaintiff as not proper evidence, but the objection was overruled. It was insisted also by the plaintiff that no proof having been given that he had *knowledge* of the bad disposition of the dog, the defendant had failed to establish a defence. The cause was tried by a jury, who found a verdict for the *defendant*, on which judgment was rendered. The common pleas of Saratoga *affirmed* the judgment, and the plaintiff sued out a writ of error.

Maxwell v. Palmerton.

S. J. Cowen & N. Hill, jun. for the plaintiff.

J. B. Bloore & G. W. Kirtland, for the defendant.

By the Court, NELSON, C. J. I doubt if it be necessary in this and the like cases to prove a *scienter* upon the owner. If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once. It seems to be settled that such proof is not necessary where a dog is in the habit of chasing conies in a warren, or deer in a park, and that he may be killed for the protection of those animals. How much more proper is it, that this should be the rule, and most singular would it be were it otherwise, when the persons and lives of rational beings are in danger. Cro. Jac. 45. 1 Saund. 84. 1 Campb. 41, n. 13 Johns. R. 312. 17 Wendell, 496. Were it necessary, I think the jury were warranted from the proof in this case in finding a *scienter*; at all events, though we might differ with them upon that question, such difference of opinion would afford no ground for reversing the judgment.

Perhaps the *opinions* of the witnesses that the dog was a dangerous animal, ought not in strictness to have been received; but the witnesses gave the grounds of their opinions, and they could not have materially varied the case. The facts were stated which had come under their observation, from which they considered him dangerous. It would be distrusting the intelligence of the jury too much to believe that the opinions of the witnesses could have added any thing to the effect of the facts in the particular case.

Judgment affirmed.

The People v. Stearns.

THE PEOPLE vs. STEARNS.

An indictment for *forgery* is good, if in it be set forth *the instrument* or *writing* alleged to have been forged, averring it to have been *falsely made* with the *intent to injure or defraud* some person or body corporate, provided the instrument be such as *on its face* to show that the rights or property of such person or body corporate *may* thereby be injured or affected ; it is not necessary that the *facts* and *circumstances* of the case showing the *intent*, should be specially set forth in the indictment ; it is enough that they be given in evidence on the trial.

It was accordingly held in this case, in which the defendant was indicted for forging an instrument purporting to be a request from the cashier of a bank in Kentucky to the cashier of a bank in New York to deliver to *engravers* the *plates* of the bank for the purpose of having new impressions taken, that it was not necessary to allege *either* that there was such a bank in Kentucky, or that the person who purported to be the writer of the request was cashier thereof and had authority to make such request, or that there were such plates in existence and in the possession or under the control of the cashier to whom the writing was addressed : all this being *matter of evidence* and not necessary to be set forth in the indictment. *Extrinsic facts* are necessary to be stated only when the operation of the instrument upon the rights or property of another is not *manifest or probable* from the face of the writing.

It was further held, that it was not necessary to aver in the indictment that the Bank of Kentucky was a *corporation* duly created ; that it was enough to allege that the instrument set forth was *falsely made*, with the intent to injure and defraud the bank ; and that under such allegation an exemplification of the act of incorporation was admissible in evidence.

The case of *The People v. Wright*, 9 Wendell, 103, examined and commented upon.

FORGERY. The prisoner Stearns was indicted for *forging* an order in these words : "To the cashier of the Union Bank—Sir, please deliver to Messrs. Burton, Gurley & Edmonds the plates of our bank, and receive them again on deposit, and oblige your obed't serv't, G. C. Gwathmay, Cashier—[Dated] Bank of Kentucky, Louisville, December 20, 1837"—with intent to injure and defraud *The President, Directors and Company of the Bank of Kentucky*, and *divers other persons* to the jurors aforesaid unknown against the form of the statute, &c. There was a second count charging the prisoner with *uttering* and pub-

The People v. Stearns.

lishing the same order with intent to injure and defraud, &c. as in first count. The prisoner *demurred* to the indictment, and assigned as cause of demurrer, *that it was not averred* in the indictment, that there was such a body corporate, or otherwise, in existence, as The President, Directors, and Company of the Bank of Kentucky; that such body carried on the business of banking, or were possessed of or had any interest in *any plates*, as specified in the indictment; that G. C. Gwathmay had authority to make such order, and that if it had been genuine it would have been a legal and valid instrument for the purpose therein intended; and that the cashier of the Union Bank had the possession of or control over *the plates* which he was requested to deliver to Messrs. Burton, &c. The court of general sessions of New York overruled the demurrer, and gave judgment that the prisoner answer over, which he refusing to do, the court directed the plea of *not guilty* to be entered for him. On the trial of the case it was proved that the order set forth in the indictment was *forged* by the procurement of the prisoner, and enclosed in an envelope to Messrs. Burton, Gurley & Edmonds, *engravers* in the city of New York, the successors of a firm who originally engraved the plates for the bills of the Bank of Kentucky, and was received by Messrs. Burton & Gurley—the other member of the firm (Edmonds) having retired from the concern; in which envelope (also purporting to be signed by G. C. Gwathmay, cashier,) they were desired to send 500 impressions from each of the plates of the bank except those of certain denominations. In the preceding year, Burton, Gurley & Edmonds had printed bills for the same bank. The order was presented by Mr. Gurley to the cashier of the Union Bank, and the plates delivered to him, and a large amount of impressions taken or bills struck of the denomination of 5, 10, 20, 50, 100 dollars, and of a *post note* in blank. The fraud of the prisoner was discovered so as to prevent the delivery of the impressions to him. The cashier of the Union Bank, called as a witness on the part of the prosecution, testified on his cross-examination, that it was well understood that the *plates* of the Bank of Kentucky were left at the Union Bank for safe

The People v. Stearns.

keeping ; that he as cashier of the Union Bank had no power or authority over deposits made in that bank for safe keeping, other than what was derived from his office as cashier ; that he did not consider himself *individually* responsible for the plates, or that any action would lie against him for refusing to obey a genuine order of the character of the one in question. The district attorney offered in evidence an exemplification of an act of the legislature of the state of Kentucky incorporating the *Bank of Kentucky*, by the name of "The President," &c. as set forth in the indictment ; which evidence was objected to by the counsel for the prisoner, on the ground that there was no averment in the indictment of the incorporation of such bank ; but the objection was overruled and the proof received. The evidence being closed, the jury were charged by the recorder, and the prisoner found guilty. The counsel for the prisoner having excepted to various decisions made in the progress of the trial, procured a bill of exceptions to be sealed, which, together with the indictment and demurrer, were brought here for the advice of this court. The case was argued here by

A. Nash & N. Hill, jun. for the prisoner.

J. R. Whiting, (district attorney of New York,) for the people.

By the Court, COWEN, J. The objections taken at the bar are reducible to the following : 1. That the indictment is defective, inasmuch as it does not aver that the object of the prisoner was to defraud any natural person by name, or any body corporate ; 2. That it avers no such connection between Ebbetts, the cashier of the Union Bank, and the plates, as to show that any order on him could operate to the prejudice of the bank ; nor that Gwathmay, the pretended drawer of the order, had any legal right to control them ; and for want of these averments, the instrument not being valid on its face, does not appear to be the subject of forgery ; 3. That the case was not made out at the trial, in-

The People v. Stearns.

asmuch as it appeared that Ebbets, the cashier of the Union Bank, in truth had no control over the plates ; 4. That although the indictment charged that the intent was to defraud a company not set forth as incorporated, yet proof was received of its being a corporate body, and this was a variance ; 5. That the president, directors and company of the Bank of Kentucky were not shown by the indictment to have been a corporate or natural person, having any interest in or control over the plates, which were the subject of the order ; and yet the proof of their being a corporation was received.

That class of objections which complain that the averments in the indictment do not show such an instrument as, if genuine, would be valid, and, therefore, the subject of forgery, involves the inquiry whether the order was apparently available to transfer the plates of the Bank of Kentucky from the custody of their depository to the hands of another. If so, the case is brought literally within the statute, 2 R. S. 560, 561, § 33, subd. 2, without the aid of extrinsic matter. The statute declares that the counterfeiting, with intent to injure or defraud, of any instrument or writing, being, or *purporting to be* the act of another, by which any rights or property whatever shall be, or *purport to be* in any manner affected, by which any person *may be affected*, or *in any way injured* in his person or property, shall be forgery in the third degree. The fraudulent uttering of such an instrument subjects the offender to the same degree of punishment as its actual forgery. Id. 562, § 39. It seems difficult for a reader to mistake the apparent import of the instrument in question. It purported to be an order from an officer representing the Bank of Kentucky, duly empowered to make it, which order was directed to another, purporting to be the depository, and desiring him to deliver the plates of the bank. The objection is, that neither any interest in, nor control of the bank over the plates, nor any power in their cashier over them, nor the custody nor control of the pretended drawee, is shown by independent averments. The objection implies that the indictment and proof must show such a state of things existing in fact, that the order, if

The People v. Stearns.

genuine would necessarily or probably work a change in the custody of the goods. It is answered that the instrument counterfeited *might*, as appears from its own language, have had the effect to defraud; and it was, therefore, sufficient to set it out, averring generally the intent to defraud; but omitting all extrinsic circumstances.

There is hardly any question in criminal pleading so metaphysical as that we are now considering, or which has presented greater difficulties to the judicial mind. In its general compass it spreads over the whole region of fraudulent device in the fabrication of forged paper, diversified almost to infinitude, as it may be, by the studious adaptations of depraved ingenuity. It calls upon courts to inquire when the paper presented is so obviously fitted to its end as to warrant a direct imputation of fraud. When shall its purpose be said at once to strike the mind? This has been much considered by the courts both in ancient and modern times; and I need not stop now to show, what will appear in the sequel, that the cases are not uniform in their tendency to sustain this indictment; though their examination has relieved me from all doubt that the decided balance of British authority, at least, is with it.

It cannot now be a serious question that the fabrication of the instrument before us was a criminal forgery. Whatever doubt might have existed at common law, whether it were to be deemed a mere false token coming in as the ingredient of a criminal cheat, or a fraudulent forgery which was in itself a crime, (vide 2 Russ. on Crimes, Phila. ed. of 1836, pp. 290 to 292, and 329 to 333, and the cases there cited,) all difficulty is removed by the statute. Every instrument in writing which may affect property: for example, an order, a letter, or a mere license, is made the subject of a felonious forgery. The question is, therefore, one of pleading. The indictment must show the forgery of an instrument which, on being described, appears on its face naturally calculated to work some effect on property, or, if it be not complete for that purpose, some extrinsic matter must be shown whereby the court may judicially see its tendency. As an instance of the latter, suppose a man has the custody of property

The People v. Stearns.

which he agrees to deliver, on the owner sending him certain words under his hand which have no respect to property ; but which are a secret sign agreed upon between them and known only to them. Such words would be the subject of forgery within the statute ; but not being significant and it not being conceivable how mischief would ensue from their use, the custody of the goods and the agreement on the words must be shown in the indictment. But suppose a letter by which the writer requests another to deliver " my purse of gold, or my package of bank bills," to A. B. : are not the court capable of seeing at once how the forgery of such an instrument may work a fraud ; and hence would not the allegation that the letter was counterfeited, with the usual general averment that the act was with intent to defraud, be sufficient ? The nature of an instrument which may intrinsically present a case of forgery was, to a considerable extent, and it struck me at first sufficiently, illustrated for all the purposes of the present inquiry by the citations of Mr. Justice *Bronson* in the late case of *The People v. Galloway*, 17 Wendell, 542. But as the inquiry is not without difficulty, and the nature of the fabricated paper must determine whether the indictment shall notice foreign facts, the examination of other cases may be material.

A writing void on its face, (for instance an unattested will of land, or a *nude pact*,) is a familiar instance of paper in respect to which forgery cannot be predicated without the averment of some extrinsic circumstances showing how it may become pernicious. *Vide People v. Shall*, 9 Cowen, 778, and the cases there cited ; *State v. Smith*, 8 Yerg. 150 ; *Price v. The State*, 1 id. 432 . *State v. Bourden*, 2 Dev. 443 ; *State v. Greenlee*, 1 id. 543 ; *State v. Dalton*, 2 Murph. 379 ; *Rex v. Wilcox*, Russ. & Ry. Cr. Cas. 50. This is on the presumption that every man knows the law, and is able to appreciate the legal effect of the instrument. Therefore, it cannot, in legal contemplation, defraud any one. The settled common law rule is stated by Mr. Hammond, in his Digest of the Law of Forgery, ch. 1, § 2, pl. 102, to be, " that how clear soever the fraudulent purpose, unless the writing is sufficient to accomplish that purpose, it is not

The People v. Stearns.

forgery, since, with a single exception, actions only, and not evil intentions, are punishable by the English law, and actions only which actually do, or *possibly may* produce injustice. *Rex v. Knight*, Ld. Raym. 527. 1 Salk. 375. 3 id. 186. *Rex v. Ward*, Ld. Raym. 1461. Str. 747." *Rex v. Knight*, was for forging an endorsement on an exchequer bill. By statute, a man indebted to the king might pay in such a bill, *writing his name* on the back, and then only the collector might pay the same to the exchequer, instead of specie. The indictment alleged that the collector forged an *endorsement* on an exchequer bill, in order to defraud the king. The court said an *endorsement* might not be *writing the name* of the payor, but a writing of something else. Holt said: "If it does not tend to the deceit of any one, it is no crime; and it *could not* deceive any one here, because it is not *the sign*. This and the like cases serve to show what is not the subject of forgery. It is such a writing as on its face *cannot* deceive. If the counterfeiting of such a writing be stated in the indictment, with the general averment that it was meant to defraud, and nothing more, this is bad pleading, because it is averring a consequence which cannot legally follow; otherwise of a writing apparently available. What are the requisites of such a writing? The argument for the prisoner is, that the writing must appear of itself to bind some interest, or assert the legal right and power of control. Take this to be so. Does not the writing in question plainly imply this right and power? An indictment at common law was for forging a surrender of I. S.'s land; and it was held good, though it was not averred that I. S. had any land upon which it could operate. *Rex v. Goate*, Ld. Raym. 737. *Rex v. Crooke*, 2 Str. 901, S. P. The surrender was *prima facie* sufficient to accomplish the forger's intention, which was to defraud. True it might not defraud J. S., who owned no land; but it might be used by the forger in dealing with others, as by conveying the land described, or raising money by pleading the forged deed of surrender, or mortgaging the land. The bond forged by Doctor Dodd, was not intended to defraud Lord Chesterfield, the supposed obligor,

The People v. Stearns.

but the money lenders with whom it was pledged. *Vide* Hammond, before cited, ch. 3, § 2, pl. 143 to 145. Such writings seek a means to attain their end through the agency of the law, being invested with a character to which the law will give a definite force and operation. *Id.* pl. 108, 109. But there are other writings having of themselves no legal efficiency, which are equally the subject of forgery. These are such as operate through the agency of natural causes: in other words, from the influence which they will naturally possess over the minds of others. As an instance of the latter, Mr. Hammond mentions a letter pleading distress, because it seeks to attain its end by means of the influence it will naturally exercise over the feelings of those to whom it is communicated. *Id.* pl. 108, 110. Looking to the order in question from the latter point of view, we may ask what more natural contrivance to defraud the Bank of Kentucky than that which it presents? The argument is, that still it *might not* work that effect, because it is not averred that Mr. Ebbetts could deliver the plates. The books already cited show that this is not the criterion; but that all the extrinsic circumstances tending to the fraud, which are implied by the writing, shall be taken to exist. Mr. Ebbetts was a good deal questioned on the trial upon the relation he held to the plates, and with a view to prove that they had never been committed to him by the Bank of Kentucky; and so that he would not be liable to the bank in case of their loss, and had no right to act upon the order. But the issue upon the indictment involved no such inquiry, farther than to see whether mischief to the bank was possible. That it was, there is no dispute in fact. Had it not been for an accident, the fraud upon the bank would have been complete, though that upon the community would probably have been much greater. But this is anticipating a point raised on the bill of exceptions. It is not the real but the apparent right of the supposed parties which the law regards in its provisions against forgery. It assumes and levels its denunciations at falsehood, as well in as out of the writing. It seeks to prevent mischief to society, which is usually as great without as with that concurrence of exterior

The People v. Stearna.

circumstances which might give effect to the instrument, if genuine. False names, false rights and false descriptions are, as well as false instruments, parts of the forger's machinery. It was once doubted by Sir Martin Wright whether, to constitute forgery of a deed, it must not purport to be the deed of a really existing person, or some one who once had existence, so that it might by possibility operate. But eleven out of the twelve judges agreed that the forgery was complete, though there never was any such person as the supposed grantor in existence. Among the reasons given, it was said, "Here is a title in *show* and *appearance*, &c. This title is transferred in *show* and *appearance* by the deed stated in the case; and all this is done with intent to defraud an innocent person," *Anne Lewis' case*, Fost. 116, 118, coupling this with the cases before cited of *Rex v. Goate* and *Rex v. Crooke*, and though neither subject matter nor grantor ever in fact existed, yet the false deed may be furnished as a forgery. Mr. Hammond treats it as now perfectly settled, that both under the statutes and at common law, a writing shall, in its professed legal character, be a forgery in spite of the non-existence of facts essential to that character. Dig. Law of Forg. ch. 3, § 3, pl. 202, 206. In id. pl. 207, he thus sums up the cases: "It is immaterial then, to the crime of forgery, that the existence of such an instrument as it professes to be, is, from intrinsic circumstances, physically impossible; since the fictitious character which it wears upon the face of it is not influenced by matter *dehors*, nor its operation, therefore, as an engine of fraud, (the only thing regarded,) thereby affected." That he is sustained by several cases, we have already seen; and there are many others. That the supposed testator is living, will not render the fabrication of a will less a forgery. See the cases cited by Mr. Justice Bronson, 17 Wendell, 542. Many other cases sustain the same principle; e. g. forging a protection from a parliament man in the name of one who is not a member, *Rex v. Deakins*, 1 Sid. 142; an endorsement in an assumed name, *Bolland's case*, Leach, 83; *Whiley's case*, Russ. & Ry. 90; *Rex v. Marshall*, id. 75; *Rex v. Francis*, id. 209; a bill of exchange drawn in

The People v. Stearns.

fictitious names, *Rex v. Wilks*, East's P. C., ch. 19, § 46; see also 2 Russ. on Cr. 325. An indictment was for uttering in Pennsylvania a forged note on the Merchants' Bank in the city of New York, without averring that it was a corporation. Duncan, J. said the crime might be complete, though there was in truth no such bank, chartered or unchartered. *The Commonwealth v. Smith*, 6 Serg. & Rawle, 570. He adds, generally, that an instrument purporting to be valid as to the purposes for which it was intended, may be the subject of a criminal forgery, though it should appear by extrinsic circumstances to be impossible that it could really exist. This was in 1819, and spoken from the same cases, and, as we have seen, in nearly the same words with Mr. Hammond, who wrote four years afterwards. All these cases take *appearances* as the test. The language of the court in *Anne Lewis' case* may be brought over and applied to the instrument in question. Here is in *show and appearance* an order from the owner of goods to his depository, that he should deliver them to another; and this is done with intent to defraud. Such *show and appearance* are stated in the indictment, and averred to be a forgery with intent to defraud; and reasoning from what we have so far seen, makes a forgery, it seems clear that nothing more need be averred. Admitting that the prisoner had been mistaken in supposing that the drawer or drawee of the order had any means whatever of controlling the plates, or the bank any existence, still the crime might be complete; for all the books agreed that *actual fraud* is not a necessary ingredient of the offence. It is the fabrication with *the intent to defraud*, and the crime shall not be excused because the offender may have committed a blunder in seeking his object. The very definition of the crime shows this. It is the false making, &c. *for the purpose of fraud and deceit*. 2 Russ. on Cr. 291, Philad. ed. 1836. Id. 333, 4, and the cases there cited. 2 East's P. C. 855.

It must still be conceded, however, that the prisoner is by no means without considerable appearance of authority in favor of his objection to the indictment. In *Walton v. The State*, 6 Yerg. 377, the supreme court of Tennessee held it

The People v. Stearns.

necessary to show by the indictment that the supposed drawer of an order for goods had an interest in them. Peck, J. however remarked that the order did not *purport* to come from one having authority, p. 335. The decision was founded on *Clinch's case*, which we were referred to on the argument. The latter arose under the English statute making it felony to forge an order for the delivery of goods; and it was said that the indictment must show the supposed drawer's authority to make the order, and that the order was to the real holder of the goods. 2 Leach, 54. 2 East's P. C. 938. 2 Russ. on Cr. 409. The insurmountable difficulty in that case was, that what the indictment sought to make a forgery did not purport to be directed to any one. *Rex v. Cullen*, 5 Carr. & Payne, 116. And East observes that, if it purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within the penalty of the act. 2 East's P. C. 940. Indeed, one part of the reasoning in Clinch's case itself, seems to admit this, and the remark is supported by a case previously decided. *Rex v. Locket*, East's P. C. 940. *Commonwealth v. Fisher*, 17 Mass. R. 46. *State v. Holly*, 2 Bay, 262, S. P. See also 2 Russ. on Cr. 325. The same remark is made by Mr. Russell. 2 Russ. on Cr. 410. Surely a like observation is applicable to the *direction*; if that purport to address a person having the custody of the goods, how is it material that the fact should be so, if we can suppose a possible fraud without it? That may happen, though the drawee be a mere servant or neighbor of the depositary. Nor, as I apprehend, is the fraudulent removal or conversion of goods, they only cheat intended to be avoided by the law; an order for delivering goods may, like a deed or note, be used as the means of fraudulently obtaining credit. The forgery of the protection from the pretended member of parliament was held pernicious, because it might be used to keep creditors at bay. 1 Sid. 142. And notes are commonly forged not to defraud the maker, but a bank or other lender. All the names may be assumed, and yet the crime be complete. *Rex v. Wilcox*,

The People v. Stearns.

Russ. & Ry. Cr. Cas. 50, referred to by Russ. on Cr. Law in connection with *Clinch's case*, related to the forgery of an instrument void on its face; the tendency of which could only be made out by averment. The case of *The People v.*

Wright, 9 Wend. 193, would certainly appear to hold that though the fabrication be of an instrument having a definite legal effect, it is still necessary that the indictment should aver the existence of extrinsic circumstances. The indictment was for the forging, uttering and publishing a mortgage against one *Shafer*, with intent to defraud him and one McCormick; and because it did not aver that there was any such land, or that *Shafer* had title to any such land as the mortgage purported to describe, the judgment was arrested. The indictment was founded upon the 22d section of the act concerning forgery, 2 R. S. 558, 2d ed. and the 37th and 39th sections of the same act. The 22d section declares that one who shall be convicted of forging "any deed or other instrument, being or purporting to be the act of another, by which any interest in real property shall be, or purport to be transferred, conveyed, or in any way changed or affected, with intent to defraud, shall be adjudged guilty of forgery in the first degree." The 39th section provides for punishing the uttering, and the 37th the having in possession with intent to utter such forged deed or instrument. The statute was held to embrace the forgery of a mortgage deed. The court, in fixing on the form of an indictment came to the conclusion, that purport alone, though followed with the averment of an intent to defraud, was not enough, without showing the actual existence of real property to which the mortgagor had title. This form of pleading is given by some of the English precedents upon a similar statute. But there are a series of well considered British decisions, which show that such particularity is not necessary; and I think raise a serious doubt whether this court did not, in *The People v. Wright*, adopt a rule of pleading at least too severe, if it is made applicable to the generality of indictments for forgery. We have already noticed *Rex v. Goate*, which held that an indictment for forging a surrender of land need not aver title in the surrenderer.

The People v. Stearns.

Gade's case, East, P. C. 874, 2 Leach, 847, S. C., related to a conviction on an indictment for forging a paper purporting to be a transfer of stock from W. H.; and the judges, on the case being reserved, said "the nature of the offence would not have been altered, if W. H. had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred." *Rex v. Goate* drew a distinction, that, where an *action* is brought for forging a deed, the title of the supposed grantor must be shown; otherwise, where an *indictment* is preferred for the crime. And see 1 Barnardist. K. B. 169, and Fitzg. 59, 60. But *Rex v. Crooker*, 2 Str. 901, is the prominent case on this point. It was for forging a lease and release. The indictment showed title of certain land to have been in the supposed releasor; but in reciting the release, this appeared to be for other land not shown to have been the releasor's. The prisoner being convicted, a motion was made in arrest of judgment. The case in Strange says, that the court, "for several terms, inclined strongly with the objection; but finally declared they were all of opinion to overrule it." They said it was not necessary there should be a charge, or a possibility of a charge, as the statute declaring that the intent to charge land should constitute the crime. The jury had found that the forgery was with intent to molest the releasor in relation to his land, though the deed blundered in describing it. It seems by a report of the same case, in 1 Barnardist. K. B., 168, that the court were, at first, unanimously in favor of arresting the judgment, and gave reasons which are there set down in full, after a learned argument, which is also there reported. But all the arguments of the counsel and court on both occasions are most elaborately reported by Fitzg. p. 57 and 261. Ld. Raymond, Ch. J. at the last cited page, says, "A forged conveyance can give no title, and therefore it is absurd to imagine that the statute could have meant to punish such forgeries only as might give a title. No, the statute is, 'that if any person forge any false deed, &c. to the intent that the state of freehold of any person, of, in or to any

The People v. Stearns.

lands, &c. shall or may be molested, &c. troubled, defeated, recovered or charged, then, &c.' Now plainly by the said act two things only are required to constitute the crime; viz. a forgery, and that such forgery be with intent to molest the owners of the freehold; so that it is not necessary that such intent should take effect, &c. It is enough that thereby the parties may possibly be molested, as by being put to defend their title." He then argues that the intent need not be specially set forth; but adds, that what is or is not an intent to do a thing within an act of parliament, is fit for the determination of the jury, "because such intent is to be collected from facts and circumstances; of which they are the proper judges." Page, J. said, "It is like the case of an indictment for burglary, laying that a house was broken with intent to steal. Such intent is left to the jury, and the special circumstances that would show such intent, are never set forth in the indictment." Probyn, J. said, "To lay all facts proving an intent, were to make indictments so special, that judgments would too frequently be arrested." And so it may be said of the case at bar, that the special circumstances showing how the fraudulent intent might touch the plates are material for the jury, but need not be averred. As title raised the possibility of mischief from the deed, so Ebbett's power of actual control over the plates made it possible to subtract them by a forged order or letter. Why should the latter be averred specially more than the former?

We have heretofore mainly attended to the connection apparent from the order between the two cashiers and the plates. The principle of the cases already cited, and others which we shall notice hereafter in respect to the description and proof of the persons sought to be defrauded, will be found to furnish a sufficient answer to the objection that the interest of the Bank of Kentucky in the plates was not averred and therefore could not be proved. The order purports to be dated at the bank, and signed by a cashier, and is for "the plates of our bank." It imports an ownership in the bank, and an attempt to exert a lawful control by its cashier. Every body would so understand it on a perusal of the whole paper.

The People v. Stearns.

Another objection to the indictment is, that the persons whom it is alleged the prisoner intended to defraud are not described with sufficient certainty. They are "The president, directors and company of the Bank of Kentucky, and other persons to the jurors aforesaid unknown." The objection is, that to warrant such general words as "the president, directors," &c., it should be averred that they were a corporation. Without inquiring whether the addition "divers persons unknown" would not be sufficient to make the averment good, even if the description of the bank were void, we are clear that the description of the bank is sufficiently certain and might have been sustained by proof either that the bank was a corporation, as was done at the trial, or that it was a joint stock company or partnership, acting under the name of "The President, Directors," &c. To this latter point see *The Commonwealth v. Smith*, 6 Serg. & Rawle, 568. Had the bank sued in this court as a corporation, it need not have been averred that it was a body corporate, any more than A. B. suing must aver that he is a natural person. And in describing persons who are aimed at by a fraudulent forgery, or as being made parties to fraudulent paper, we think even less certainty is required; though we agree that the description of the intended dupe must be true. Where the partnership name was mentioned as the drawees in a forged bill, it was held that the indictment need not give the names of those who composed the firm, though this would be necessary in an action upon a bill either by or against a firm. *Rex v. Lovell*, 2 East, P. C. 990; 2 Leach, 282, S. C. And *vid. The Commonwealth v. Smith*, 6 Serg. & Rawle, 568, 570. If it be answered that the drawees or other parties supposed may or may not exist, but that the person aimed at as the dupe must exist, let the distinction avail, and we have here a corporation described with all the usual certainty; a corporation which, though foreign, is clearly the object of criminal mischief within our statutes of forgery. 2 R. S. 587, § 37, 2 ed. When Mr. Hammond wrote, which was in 1823, the question according to him, remained open, whether words describing the firm, as in *Rex v. Lovell*, would be a sufficient designation

Couch v. Mills.

of the persons defrauded. Dig. of the L. of Forgery, pl. 347, and note. For aught I have been able to learn from the books, that question remains open still, and there is no need of closing it in order to sustain this indictment. We therefore think the *demurrer* was not well taken.

The points arising on the *bill of exceptions* have been in a great measure anticipated. The means and tendency to a gross fraud were established by competent evidence, to the satisfaction of the jury; the connection of the bank and the assumed drawer and drawee with the plates being such as to facilitate the effect of the order, that was enough. The incorporation of the Bank of Kentucky, under the name stated in the indictment, was duly proved by a copy of its charter authenticated pursuant to the statute of the United States; and that proof was admissible under the averment in the indictment.

The sessions are advised to pass sentence upon the prisoner.

COUCH vs. MILLS and others.

A covenant by the holder of a promissory note that he will not sue or levy upon the property of *one of several makers* of the note, entered into after the commencement of a suit; and in case any proceeding at law or equity be had, *continued* or prosecuted, that the covenant shall be deemed, *to all intents and purposes a release* to such maker, in, notwithstanding the terms of the instrument, *a mere covenant not to sue*, and cannot be pleaded *as a release* in bar of a recovery against all the makers.

DEMURRER to plea *puis darrien*. The plaintiff declared on several promissory notes made by the defendants. Mills alone appeared and pleaded *non assumpsit* and several special pleas. After issue joined, he put in a plea *puis darrien*, that the plaintiff ought not *further* to have and maintain his action because, on, &c. at, &c. he by a certain writing under seal, in consideration of \$500, to him paid by *Henry Talmage*, one of the defendants in the said action, covenanted and agreed with the said *Henry Talmage*, that neither he, the plaintiff, nor his executors, &c.,

Couch v. Milla.

should at any time or times thereafter, sue the said Henry Talmage, or levy upon his goods or chattels, for or by reason, or in consequence of the promises and undertakings in the declaration in this cause mentioned; and in case any proceeding either at law or in equity should be had, *continued* or prosecuted, then that the said writing *should be deemed to all intents and purposes a release* to him and the said Henry Talmage, from and against the same. The defendant then averred that afterwards, to wit, on, &c., at, &c., the plaintiff *continued and prosecuted this suit*, contrary to the covenants in the said writing contained: whereby the said writing became, and was, and is, *an absolute release and discharge* to the said *Henry Talmage* and the other defendants in suit, concluding with a verification and prayer of judgment, if the said plaintiff ought *further* to maintain his action, &c. To this plea the plaintiff *demurred*.

J. Butler, for the plaintiff, insisted that the instrument set forth in the plea was a mere *covenant not to sue*, and that such a covenant is not in law regarded as a *release*, unless made with all the parties liable to be prosecuted. He cited *Dean v. Newhall*, 8 T. R. 168; Collyer on Part. 361; *Brown v. Williams*, 4 Wendell, 366; *Bank of Chenango v. Osgood*, 4 id. 607.

C. Judson, for the defendant, relied upon the *peculiar terms* of the instrument set forth in the plea as distinguishing this from all previous cases.

By the Court, NELSON, Ch. J. The language of the instrument as set forth, is undoubtedly very particular; but it is manifest from the whole scope of it, that it was not intended to have the operation and effect of a technical release upon the subject matter of the suit; but only to protect the rights of the covenantee; which may be done by a cross action if he suffers. Neither is it more specific than the covenant in the case of *Dean v. Newhall*, 8 T. R. 168. That stated if any of the creditors sued, &c., the covenant should be a sufficient *release and discharge to all intents and pur-*

Barnes v. Henshaw.

poses. Not being regarded as a technical release, but only as a covenant not to sue, it is well settled, that in the case of two or more joint obligors, it constitutes no defence to the action.

The distinction between a covenant not to sue one of several covenantors, where the obligation is *joint and several*, and when *joint* only, was noticed and repudiated by Gibbs, Ch. J. in *Hatton v. Eyre*, 6 Taunt. 289. Carey on Part. 132. And. 307. The latter was considered as standing upon equally solid reasons with the former.

The main ground is, that to construe it into a technical release of all, would be carrying the obligation beyond the obvious intent of the parties. If it had been intended to be so understood, more direct and pertinent language would have been used, clearly indicating the intention to embrace *all* the promissors.

Judgment for plaintiff on demurrer.

BARNES vs. HENSHAW.

On the trial of a cause a party is not at liberty to object to the *generality* of a *bill of particulars*; if the *cause of action* or *matter of defence* be embraced in the bill, though in the most general terms, the evidence offered in support of the allegations of the party is admissible, the same as under a declaration on the money counts. The party if dissatisfied with the bill, should have applied for *further particulars*.

ERROR from the superior court of the city of New York. C. I. Henshaw sued S. D. & R. Barnes in the court below in an action of *assumpsit*. The declaration contained the *money counts* only, but the plaintiff had furnished a *bill of particulars*, which, after stating the title of the cause, was in these words: "1834. June 16. Cash *lent and advanced* to defendants at their request \$225. 1834. Dec'r 19. Cash *paid for defendants*, and at their request, to the Brooklyn Bank, Long Island, \$225. 1834. Dec'r 19. Cash paid to take up the plaintiff's *accommodation note, lent to defendants*, dated June 16, 1834, at 6 mos. \$225." The plaintiff offered in evidence a written agreement signed by the de-

Barnes v. Henshaw.

defendants, by which it appeared that on the 16th June, 1834, he gave his note to the defendants for the sum of \$225, payable in six months, in consideration of which they promised to put up iron railings in front of two certain houses in Brooklyn; and he further offered to prove that when the note came to maturity he, the plaintiff, took it up at the Brooklyn Bank, where it had been discounted, and that the defendants had not put up the railings, wherefore he claimed to recover back the money thus advanced by him. The defendants objected to the evidence on the ground that it was not admissible under the *bill of particulars* which had been served in the cause. The presiding judge overruled the objection, and the evidence was received; to which decision the defendants excepted. The plaintiff obtained a verdict, and the defendants sued out a writ of error. The *bill of exceptions* presents several questions besides the above, but the case is reported only in reference to the question arising upon the *bill of particulars*. The cause was argued here by

J. R. Whiting, for the plaintiffs in error.

A. Crist, for the defendant in error.

By the Court, COWEN, J. The *bill of particulars* told the defendants that the plaintiff claimed the money paid on the note of the 16th June, 1834. It calls the note by mistake an *accommodation* note; but date and parties are given, and place where and time when the money was paid. No variance in these respects was pretended. It was sufficient fairly to apprise the defendants that the plaintiff claimed to have the money he had paid on this note refunded, and the sum is truly stated at \$225. That was enough, I apprehend, under the circumstances, especially in connection with the notice which had been previously left at the defendant's shop, and which in all probability reached them.

It is enough, however, at the trial, that there was no variance between the bill of particulars and the cause of action. This bill was for three different items; one of which was

Barnes v. Henshaw.

for money paid generally at the Brooklyn Bank on the request of the defendants. That had been done. Under the circumstances, the payment was, in legal effect, at their request, so as to maintain an action for money paid. Another was the item which we have noticed, referring to the note more particularly. It is true, the bill did not set out the special agreement, and say that it had not been performed, or that it had been rescinded, or that the plaintiff claimed to have it so considered. But that was an objection arising from want of sufficient particularity; not for variance. The bill was true to the real cause of action, as far as it went. Had the defendants desired that it should inform them more particularly of the ground or reason why the money was claimed, the only course was to obtain an order at a judge's or commissioner's chamber for a farther bill. The trial is not the place at which an objection for too great generality in the bill can be made. For this purpose, as for many others, it is considered a pleading; and if it be insufficient, a demurrer not lying, the rules of practice put the defendants to a further order to remedy the defect. Take the case that a bill is as general as the declaration; money lent, &c., money paid, &c., money had and received, &c. It is a clear evasion of the order; but you cannot object this at the trial. The court may, in their practice, handle the party who furnished it somewhat severely; and unless he shows that it was impossible to be more specific, may non-pros him, or shut out his set-off, at least, accordingly as he happens to be plaintiff or defendant. Yet, if the bill were correct in speaking of the cause of action as far as it went, it was not objectionable on the trial. The declaration alone will in such case be regarded, and if the proof be receivable under that, it must be let in. This doctrine is collectable from *Goodrich v. James*, 1 Wendell, 289, and *Lavelock v. Cleveley*, 1 Holt's N. P. Cas. 552. In the first, a motion was made to set aside the plaintiff's proceedings as irregular, because his bill was insufficient in merely referring to a former account rendered. Sutherland, J. said such a reference was sufficient, which I think would allow a regard to the former notice served on the

Barnes v. Henshaw.

defendants here as material on the question of sufficiency. But I do not go upon that ; though I have looked over the cases, and am satisfied the bill might answer very well, even on a summons to give a more perfect one. In the case cited, the party could not interpose his objection to the bill in the form he had chosen. He was not to lay by in the way he had done, and then move to set aside the proceedings. The judge therefore added, "the party, if dissatisfied, should have obtained an order for further particulars, and had no right to consider the plaintiff in default because he had furnished an insufficient bill." In *Lavelock v. Cleveley*, Gibbs, Ch. J. said, "the party who objects to the particulars as insufficient, must make his complaint at the proper time. He cannot wait till the trial of the cause, and then raise an objection, which if earlier made might have been disposed of." Had the plaintiff, in the case at bar, stated the particular circumstances in his bill, and that falsely, it would have been another matter ; as if he had departed very widely by his evidence from a material date, or called the money, as in his first item, "money lent," and stopped there. The proof then might have been said to vary. But if he had simply followed the general counts, though this has been held a contempt, it would not furnish a ground of objection at the trial.

I suspect the distinction stated may not have always been attended to ; but I am satisfied it exists in principle, as it has been sanctioned in practice, and ought not to be departed from. If the party calling for the bill thinks he has not been fully informed, or desires farther information, a judge may suspend the proceedings, and at chambers look into the matter, and require the party in default to give such farther information of particulars as may be reasonably required, and it is in his power to give. That is the place for trying the sufficiency ; in other words, the fullness and particularity. Whether the party has gone as far as he is able in his statement, may be one question. Extrinsic circumstances are to be looked into. Therefore, the question on fullness is one which cannot be determined by the judge at the trial. He cannot know intuitively what story the party

 Conklin v. Egerton's administrator.

supposed to be in default could have told about his cause of action, with safety to his ulterior course in the cause. If the bill was insufficient, therefore, it should have been objected to, at least before the trial; and, indeed before the party objecting took another step in the cause. If a party go on or lie by an unreasonable length of time, he waives all objection on account of the defect.

Judgment affirmed.

 CONKLIN vs. EGERTON'S ADMINISTRATOR.

A power to an executor to sell and dispose of real estate granted by a will, and to divide the proceeds among devisees to whom the estate was given by a previous clause of the same will, cannot after the death of the executor be executed by AN ADMINISTRATOR *cum testamento annexo*, notwithstanding the provisions of the revised statutes, that "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators of such will shall have the rights and powers and be subject to the same duties as if they had been named executors in such will."

ERROR from the superior court of the city of New York. Thomas Asten, as survivor, &c. brought an action of *debt* on a bond executed by William Conklin to him and John Baker, as administrators, &c., of Abraham S. Egerton, deceased, bearing date 1st May, 1827, *conditioned* that during the life of one *Judith Myers*, the obligor should pay to the obligees annually the sum of \$84; and that if they should within two years after the death of *Judith Myers* cause the fee of a certain lot to be conveyed to him *by the owners of the lot*, at a fair and reasonable price to be agreed upon, or ascertained in a certain manner, to be paid by the obligor on the delivery of the deed, that he would in addition to such price pay to the obligees the further sum of \$1200, with interest from the time of the death of *Judith Myers*. This bond was given in consideration of the assignment of a lease executed by *Judith Myers* and one *Ephraim Hart*, the executor of Manuel Myers, to Abraham S. Egerton, for the term of the natural life of *Judith Myers*; and contained a

Conklin v. Egerton's administrator.

clause giving to Egerton, his heirs and assigns, the right of *pre-emption* at a price to be liquidated in the manner particularly pointed out in the lease. The plaintiff, after setting forth the bond and condition, averred that *Manuel Myers*, at the time of his death, was seised in fee simple of the lot mentioned in the bond, and that by his last will and testament he duly authorized and empowered one *Ephraim Hart*, his executor therein named, *after the death of Judith Myers*, to sell and dispose of the lot ; that *Judith Myers* died on the 13th November, 1832 ; that *Ephraim Hart* died previous to the decease of *Judith Myers* ; that on the 10th April, 1834, the plaintiff, for the purpose of enabling him to comply on his part with the conditions of the bond executed by the defendant, procured administration to be granted *with the will annexed* to *Alpheus Sherman*, then public administrator of the city of New York, who took upon himself the discharge of the duties consequent upon such grant ; that on the 1st May, 1834, the plaintiff *tendered* and offered to the defendant to cause the fee of the lot mentioned in the bond to be conveyed to him, at a price to be agreed upon as stipulated in the bond, and requested him to accept a conveyance, &c., and to pay the \$1200 according to the condition of the bond ; but that the defendant utterly refused to do any thing in the matter, whereby an action had accrued, &c. The defendant pleaded, 1. *non est factum* ; 2. that the plaintiff did not offer to procure a conveyance *from the owner or owners*, or any person having power or authority to convey ; 3. that *Alpheus Sherman* had no power to convey ; 3. that the defendant had not refused to accept a conveyance, &c.

On the trial of the cause the evidence fully sustained the facts alleged in the declaration. Among other proofs adduced by the plaintiff, was the *will of Manuel Myers* bearing date 13th May, 1799, by which he gave unto his wife *Judith*, during the term of her natural life, the rents, issues and profits of all his real estate ; and *after her decease*, *devised* all his real estate *in fee* to two sisters, two nephews and five nieces, to take, share and share alike ; and for the more easy and equal division of his said real estate, he au-

Conklin v. Egerton's administrator.

thorized and empowered his executors, "hereinafter named," after the decease of his wife, *to sell and dispose* of the said estate for the most money that could be gotten for the same, and in due form of law, to *execute* deeds of conveyance for the same in fee simple; and *to divide the money arising from the sale* among his sisters, nephews and nieces. The testator nominated his wife *Judith* executrix, and his friend *Ephraim Hart*, executor, of his last will, &c. The evidence being closed, the counsel for the defendant insisted that the plaintiff was not entitled to maintain the action, on the ground that Alpheus Sherman, notwithstanding the grant of administration to him *with the will annexed*, had no authority to convey the lot mentioned in the bond, and requested the presiding judge so to instruct the jury. The judge declined so to charge, and on the contrary, instructed the jury that under the will of Manuel Myers, and the letters of administration with the will annexed, Mr. Sherman had authority to convey. The counsel for the defendant excepted to the charge, and the jury found a verdict for the plaintiff; on which judgment having been entered, the defendant sued out a writ of error. The case was very fully argued by

P. De Witt & C. O'Connor, for the plaintiff in error.

W. Silliman, for defendant in error.

By the Court, COWEN, J. Had Mr. Sherman, as administrator with the will of Manuel Myers annexed, the right or power to convey the lot? This is the only question before us, as presented both by the pleadings and bill of exceptions. By the statute, 1 R. L. of 1813, p. 316, § 21, it was enacted, in the words of 1 R. L. of 1801, vol. 1, p. 541, § 20, "that in all cases where administration shall be granted with a will or testament annexed, the will of the deceased in such testament expressed shall be observed and performed; and that *this act* shall extend to administrators with such will annexed, in the same manner as if they were executors named in such will." The statutes, 2 R. S. 16, § 22, 2d ed.

Conklin v. Egerton's administrator.

are as follows: "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; *and the administrators with such will annexed shall have the rights and powers, and be subject to the same duties as if they had been named executors in such will.*" Mr. Sherman belonged to that class of personal representatives known to the law as administrators *cum testamento annexo, de bonis non*: that is to say, an administrator appointed to wind up the affairs of an estate which has already been partially administered by a previous executor or administrator, who is either dead or incapable of further action. Blackstone, and other approved writers, remark what is obvious, that his duty is very little different from that of an executor. 2 Black. Comm. 503, 504. 1 Wms. Ex. 284.

The sections of the acts of 1801 and 1813, first cited, are parts of statutes "concerning executors and administrators, and the distribution of intestates' estates. They relate exclusively to the *personal estate*, e. g. inventories, distribution, remedies by action, &c. The section quoted from the new revised statutes makes part of an article entitled "Of granting letters testamentary," 2 R. S. 13, 2d ed. and is immediately followed by the article "Of granting letters of administration with the will annexed, and in cases of intestacy." Id. 16. The amount of the security to be required for the faithful discharge of the appointee's duty, whether executor or administrator, general or special, is governed entirely by the value of the *personal estate*. § 6, 7, 42, 43; and all the particular provisions contained in these articles, either expressly or in their own nature, refer to the same kind of estate. The twenty-second section, under which it is claimed that Mr. Sherman had power to execute the deed, is broader than that in the old section, of which it was a revision. The old section extended the provisions of the particular statute of which it made a part so far as it respected executors, to administrators *cum testamento annexo*. The revising section declares that they shall have *the same rights and powers*, and be subject to the same duties as if they had been *named executors* in the will. There

Conklin v. Egerton's administrator.

is no dispute that they take all the powers as well as rights and duties which belong to the *executor as such*, whether those powers were conferred by the act, or exist at common law.

The surrogate's court was created and its general powers prescribed by statute; and looking at that alone, there is some difficulty in seeing how the surrogate is to acquire jurisdiction, or the administrator a right to act, where, as was probable in this case, the whole business of the estate in respect to the personalty was closed, and nothing left by which to measure the *security* to be given. Security would seem to be essential, and yet the bond could not be taken for want of any thing by which to estimate the amount of the penalty. § 42. There is also a total want of subject matter. There is no payment of debts to be made by a sale of lands; and letters testamentary or of administration granted by the surrogate, who comes in place of the ordinary or bishop of the English system, have respect, primarily, to the *personal estate* alone. Whether the total want of personal estate be a jurisdictional defect or not, so as to render the appointment void as being *coram non judice*, it is used with great propriety by the counsel for the plaintiff in error, as an argument against extending the words *powers of an executor*, used in the statute, beyond those which pertain to him strictly as such. The argument is certainly much strengthened, when it is seen that none of the provisions of other sections in the articles cited, can with any degree of propriety, be applied to the testator's *real estate*. The reason of the new provision in question is probably to be found in the fact, that the revised statutes had abolished the succession to the executor of an executor, and determined to substitute an administrator with the will annexed, who should give security. See sections 17 and 22, in 2 R. S. 15, 16, 2d ed., with the sections before cited concerning security: This would call for no greater power than belonged to the former successor, which, as we shall see, would not extend to a power of selling land. Stopping, therefore, with the statute, and construing it according to its subject matter and its object, it seems to me, that courts

 Conklin v. Egerton's administrator.

ought to hesitate long before they extend the section in question to the *donee of a power in trust*, created by the will in order to effectuate a devise, even if we suppose that such a power, in a legal sense, belongs to him as an executor. We should feel quite unwilling to believe that the legislature intended to confer on a surrogate the right of transferring an important power confided by the testator to his friend, without recognizing the beneficiaries as parties to the proceeding, and substituting no one to resist the application for an appointment, if personally improper, to sue for its revocation when improvidently made, and without even demanding security for the due execution of the power.

Again; the power in question was conferred in 1799, by a very solemn act, an express declaration of confidence, though that is always implied in such appointments; and the statute which, it is claimed, has given it to the public administrator, was not passed till 1830. Even if the legislature had declared, in terms, that such a trust power might thus be transferred, the act would certainly be open to the question whether they intended that it should retroact upon powers previously created, (for they have not said it should,) or upon prospective powers only. The devisees interested in the sale of this property had a right, and they still enjoy the moral right to demand, that on the death of the original trustee, the power should either not be executed at all, or at least, if executed, that it should be done by some person appointed by and acting under the control of the court of chancery. 1 R. S. 724, 2d ed. § 68. Id. 728, § 102. A statute ought not, except where the terms are explicit and imperative, to be construed literally, if by such construction it will impair rights which became vested before its passage. If the act in question be at all operative upon the rights of devisees, still it is the more just construction to say, that its influence shall be confined to those who claim as such, under wills made since the statute was enacted. *Dash v. Van Kleeck*, 7 Johns. R. 477, and the books there cited.

Independent, however of the intrinsic difficulties arising upon the statute, conceding as I have for the purposes of the question that the office of selling the land belonged to Hart

Conklin v. Egerton's administrator.

as executor, I have not been able to perceive that, in this respect, the law considers him such. And it appears to me that the difference which has attended this novel effort, (for with us it is the first of the kind, though we shall see hereafter it was once made and defeated in Ohio,) to vest in an administrator the power of selling the real estate of a devisor, has arisen from confounding the legal office of an *executor* with that of one who is not so in any sense of the word but who is the mere *donee of a trust power*; an authority which, so far from having any reference to the office of executor, might just as well have been conferred by the will on any other not named as executor, and one who might have executed the power without probate or letters testamentary. An executor is one appointed to the general office of executing a man's last will and testament. 2 Black. Comm. 503. A testament in strictness concerns a personal property merely. Until the revised statutes, it needed no witness of its publication; it belongs to the ecclesiastical jurisdiction; it might, by the canon law, be made at the age of fourteen, and the executor could not act in all respects as such, till he obtained letters testamentary of the ordinary, with us of the surrogate; and it cannot be executed except by an executor or administrator. To make an executor, the will must appoint him such *eo nomine*. Even a trustee of all the testator's personal estate, named and appointed as such by the will, is not an executor. Where a man was appointed by the testator *trustee of his last will and testament*, and was committed by the ecclesiastical judge for not exhibiting an inventory and account, the king's bench discharged him on *habeas corpus*, saying that, in this character, the judge had no jurisdiction over his person. *The King v. Jenkins*, 1 Dowl. & Ryl. 41.

A *will*, or, as it is more properly called, a devise of real estate, is of an entirely different and opposite character to a testament. A devise is a conveyance of land, and not under the same jurisdiction as a testament. 2 Black. Comm. 501. The devisor must have reached the age of twenty-one years; and, what is more material to the question before us, it is complete, or may be executed without the ap-

Conklin v. Egerton's administrator.

pointment or intervention of an executor or administrator. Indeed, these offices are neither of them predicable of a devise of real estate. The devisor may require some future act to be done, in order to the vesting of an estate; and may, and often does, delegate the power to some friend who is to designate the devisee, or make a sale and distribution of lands already devised in fee. But, in this, his friend does not act as executor; the law does not consider him as such. His powers are regulated by distinct departments of the statute or common law, those relating to powers in trust, the due execution of which are supervised not by the ecclesiastical tribunal, the surrogate's court, but by the courts of chancery and common law. The very opening of Mr. Sugden's treatise on powers settles the donee's character. His remarks are as follows: "A power given by a will, or by an act of parliament, as in the instance of the land tax redemption acts, to *sell an estate*, is a common law authority. The estate passes by force of the will or the act of parliament; and the person who executes the power merely nominates the party to take the estate." 1 Sugden on Pow. 2, id. 171, 2, S. P. 6th Lond. ed. That the estate passes by force of the devise, was held in a case where the devisor gave power to his executrix to sell land for the payment of debts, in 9 Charles I., *Dike v. Ricks*, Cro. Car. 335—a business much more pertinent to the general office of executor than the sale of Myers' estate; and the distinction has never been questioned before or since that time. Powell, in his treatise on devises, gives the result of the cases as follows: "And such authority must be strictly pursued; for the authority to sell is founded on the will alone, without which no authority would let in the persons directed to sell. The law, therefore, looks at the sale as a thing annexed to the persons of those to whom the authority to sell is given, and to no others, because of the *special trust* that is put in them by the testator; which trust no man can have by the will, (which in this respect operates as a *warrant of attorney*,) but only those who are named; and where there is but one alive, the authority is relinquished and gone, *because in such case they do not take*

Conklin v. Egerton's administrator.

as executors virtute officii, but as trustees. And that is the reason why they may sell the land, *although they refuse the administration.* But their *executors cannot sell, because the trust is personal.* It is otherwise where they take *as executors.*" Powell on Dev. 194. In *Franklin v. Osgood*, 14 Johns. R. 527, 553, which was a very well considered case, and in which Platt, J. delivering the prevailing opinion, says: "It is clear, that at common law, a naked power given to executors to sell lands would not survive. It is like a *naked power of attorney* to do any other act given to several persons jointly; and if one die, the power expires; for it is a delegation of power for private purposes given generally to all the attorneys named in the power." This doctrine was not denied by Thompson, J., though he dissented on other grounds. The distinction is held by many other books, ancient and modern, both in respect to devises of land in trust to executors, and devisors of a naked power to sell. In respect to the latter, it is recognized by the statute. 2 R. S. 47, § 55, 2d ed.

Looking at the manner in which Hart's character has been treated in other courts, we can hardly recur too often to what has already been said: that the differences in the case before us have arisen wholly from confounding his two characters of *executor* and *attorney*. It will be seen hereafter to have been deemed so plain, by a very learned judge, as to be taken for granted, that Hart's *authority to sell* the land was a part of his power *as executor of Myers' testament*. It has been seen, I think, by what we have said, and the cases already cited, that this proposition cannot be maintained. It is impossible to deny, however, that the language of some of the books may, if read without keeping a steady eye to the real nature of the power of sale, give color to the proposition. Before entering farther, therefore, into the cases which enforce and illustrate the separation, it may be well to notice some of those which have probably been regarded as making the nature of the two powers identical. If it be seen that a power by will to sell real estate can with no more propriety be called *executorial*, than the power of an executor might be designa-

Conkha v. Egerton's administrator.

ted as that of an attorney—if the two powers are not more nearly identical, than letters testamentary and a written warrant of attorney, there is an end of the question. No one would pretend, that a statute declaring the authority of an executor capable of passing to an administrator would extend to a warrant of attorney, which the executor might hold, giving him authority to sell his neighbor's farm. The cases which resemble a power by will to sell lands, the nearest to that of executors, are those which allow survivorship for that purpose among several executors. Sugden, after premising a distinction in this respect, which has been often adverted to by courts, between a devise of land *to executors to be sold*, and a *mere will* that the devisor's *executors should sell*, viz. that in the former case the power survives, but in the latter not, observes: "Cases are not wanting on the other side of the question; and in the case of *Houell v. Barnes*, Cro. Car. 382, and other books, although it was holden that the executors took an authority, only, yet Jones, Crooke and Barkeley determined that the survivor could sell. Jenkins gives it as his opinion, that if a devise be that A. and B., the executors, shall sell certain land, and near the end of the will the testator also names them executors, if the one dies, the other may sell; for *the interest is annexed to the executorship*, by this repetition in the will. Mr. Hargrave has endeavored to establish that where the power is given to *executors*, or to persons *nominatim* in *that character*, the *survivor* may sell, as the power is given to them *ratione officii*; and as *the office survives*, by parity of reason the *authority should also survive*. And the liberality of modern times will probably induce the courts to hold, that in every case where the power is given to *executors*, as the office survives, *so may the power*." 1 Sugden on Pow. 143, 4, 6th Lond. ed. I have cited Sugden as embodying the cases and writers which present the very strongest points of analogy, between the two powers. He cautions us in a note not to confound a *mere power to sell* with a *devise* to trustees; and expresses his serious doubts whether, upon present authority, the former can survive, even though conferred on executors either *nominatim* or as

Conklin v. Egerton's administrator.

executors, ratione officii. But admitting this to be settled in the affirmative, it still comes short of showing that the power of sale is exercised by the nominees or the survivors *as executors*. The confusion arises from its being said that the power is *annexed to the office* of executors, as if it therefore made part of the office; whereas, a little attention will show that the whole is but a designation of the persons who are to execute what Powell, and after him, Platt, J. correctly call a *mere warrant of attorney to sell the land*. True, it must, when derived from a devisor, be executed in the name of the attorney because the principal is dead. But this is no more than a necessary change in the form of the deed. Take the case of a devisor, declaring by will that the county judges shall sell his land; one of the five dies, and the next day the survivors make the sale. That they may do, within the principle to which the remarks of Mr. Sugden give countenance. The reason is, because, by the will, *the power is annexed to the office* of judges. They take *ratione officii*. Yet suppose a statute could pass transferring in terms all the powers, rights and duties of the county judges to others, no one would pretend that their power to convey the land would be vested in the transferees. Yet the case would be the same with the one now before us, provided we are right in supposing that the *donee of a trust power* is not, as such, *an executor*. The question of survivorship is one of designation, and nothing else; saying that the executors or county judges shall sell, is construed to mean the same as if the testator had said, in so many words, that the sale might be made by them or the *survivors of them*. Many instances of the power and practice of doing this expressly, and even extending the authority to persons not *in esse*, are set down by Mr. Sugden, in his treatise on powers, vol. 1, p. 145, *et seq.* 6th Lond. ed. Thus, a testator may expressly devise a power to the executors of his executors; and, in this illustration from cases of designation, we may advert to powers conferred upon trustees, as well as naked powers, for the principle is the same. A power may be given to the heirs of a person who is yet alive. Two remarkable instances depending on this prin-

Conklin v. Egerton's administrator.

ciple occurred in *Mansell v. Mansell*, Wilm. Notes, 36, and *Cole v. Wade*, 16 Ves. 27. It is a principle quite pertinent to the case in hand; and its consideration will presently be resumed when I come to notice cases cited by the counsel for the defendant in error, as going still farther to show that Hart's power of selling the land belonged to him in the capacity of executor, and not as attorney. I propose first to notice how the matter has been considered by a recent case in this court, even where the power of sale was coupled with an interest.

Judson v. Gibbons, 5 Wendell, 224, was the case of a devise to executors of real and personal estate, in trust, to sell, take care, &c., invest the income, and distribute, &c. One of the executors refused to act. Savage, Ch. J. said, "there was no act of his necessary to be done by way of condition precedent. The estate in land [erroneously printed 'hand'] at the testator's death, *belonged to the executors as trustees, not as executors*. The character of executor and trustee are not necessarily blended. Suppose it had been part of the trust, that the real estate *should be sold*, all the trustees must unite in the conveyance." And the renouncing executor was held to be bound as trustee, though he had declined the office of executor. The case of Hart, in the matter before us, is the more distinct from that of an executor, inasmuch as he took no interest in the land, but held a mere naked power. Savage, Ch. J. in *Jackson, ex dem. Bogert, v. Schaubert*, 7 Cowen, 183, 194, and the authorities there cited. *Sharpsteen v. Tillou*, 3 id. 654. *Woodbridge v. Watkins*, 3 Bibb, 350. *Jameson v. Smith*, 4 id. 307.

Under this view, it may be proper to observe, also, before adverting farther to the authorities cited by counsel, that the very question now before us arose and was determined, upon distinctions drawn from the common law, before the supreme court of the state of Ohio, sitting as a court of chancery, in the case of *Wills v. Cowper*, 2 Ham. R. 124. The deviser having land lying in Ohio, but himself residing in Virginia, where is a statute, *in terms*, authorizing an administrator with the will annexed, to execute a power of selling

Conklin v. Egerton's administrator.

land, given by the will to an executor, made his will constituting J. Baker his executor, with full power to dispose of all his lands in the states of Ohio and Kentucky. Baker renounced the executorship, and the administrator with the will annexed, having, as such, agreed to sell the land which lay in Ohio, the bill was filed by the vendee to compel a specific execution. This was resisted and denied by the court, on the sole ground that the power of the executor could not thus be executed by one whom the testator never had mentioned, nor could have contemplated as a depository of such a power. Sherman, J. in delivering the opinion of the court, shows that the general office of administration, which relates to mere personality, is considered in a light very different from special naked powers conferred by a devise. He says: "It is a general and well settled rule, both at law and in equity, that a power given by will to the executor to sell and convey land, is to be considered as a personal trust. In contemplation of law, the power is given in consequence of the confidence which the testator had in the judgment, discretion and integrity of the executor; and the execution of that power cannot by the executor, be delegated to any other person. It would be absurd to suppose that the confidence which the testator had in the knowledge and integrity of his executor and which induced him to confide to such executor the power of selling and conveying his lands, could extend to unknown persons. To render a sale under such a power good and valid, the executor must personally assent and act; and upon this principle it has been held, that a joint authority given to two executors, can only be exercised by the joint act of both, and is determined by the death of one." The opinion in this case is farther material, as bearing on an argument advanced for the defendant in error, which supposed that a mere power to do an act of ordinary sale, was not the subject of that special trust and confidence which is considered by the law as so strictly personal that it cannot be delegated to another, or at least that it shall not survive, and even pass by succession to the executor of an executor.

Conklin v. Egerton's administrator.

I will now resume the question as to the *identity* of an executorship and a trust power to sell land conferred by a will, as it stands upon some quotations made in the course of the argument for the defendant in error. Powell on Devises is relied upon, who states certain decisions, which are cited to us through that book. I will state the doctrine of Powell as I understand it. He says, in effect, that where a will gives a general authority to sell land *for the payment of debts*, naming *no one* as the person who is to make the sale, there, as the executors or the survivors of them, and even the executor of an executor, are the persons to whom, as such, the duty of payment attaches, the will has been held to imply that such survivor, &c., may sell. Powell on Dev. 196, 197, and cases there cited. But neither this nor any other book goes farther; and the whole is evidently no more than the testator might have done in another form, as we have just seen. It is the same as if he had said expressly, *the survivor*, &c., should sell. Whoever the implied agent for selling, may be, the sale does not, therefore, take effect as emanating from an executor, but from an individual who has been designated by necessary implication, rather than there should be a failure of the power. On the other hand, Wentworth puts it, that "where, by will, a *special trust* is recommended *to an executor*, as *to sell lands*, &c., this not performed in his lifetime, shall not be performed by his executor. Wentworth's Off. Ex. ch. 20. Mr. Sugden, in the 6th London edition of his Treatise on Powers, vol. 1, p. 133 to 139, pl. 26 to 36, has considered the cases which have gone upon this distinction, and he evidently regards it as a mere question of *designatio personæ*. He introduces the subject by the following remark: "It sometimes happens, that a testator directs his estates to be sold for certain purposes, without declaring *by whom* the sale shall be made. In the absence of such a declaration, if the fund be distributable by the executor, he will have the power by implication." Id. p. 133, pl. 26. He then states the cases in detail from Keilw. 17, H. 7, to *Tylden v. Hyde*, 2 Sim. & Stu. 238, A. D. 1825. The remark of Sir John Leach, the vice chancellor, after hearing the argument of the latter

 Conklin v. Egerton's administrator.

case, will show the utmost extent to which the doctrine can be carried. He says, p. 241, "Where there is a general direction to sell, but it is not stated *by whom* the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell *will be implied to the executors.*" That was not like the case at bar, on a will *naming* the man, but a *general direction* to sell real and personal estate, and distribute both among persons named; and it was held, the testator, therefore, intended that the executor should perform the act of selling both. Mr. Sugden, himself, who was afterwards chancellor of Ireland, argued on one side. The attention of a man so distinguished for ability and research, having been drawn to the question, both as counsel and as author, we may well allow that he has exhausted the sources of judicial instruction. At pl. 30, he adds: "And in one case, Mr. Justice Wild conceived, that the executor of an executor might sell, which opinion appears to be well founded, because the chain of representation was not broken; and the *intent was*, that the power should be executed *by him* to whose hands the money was to come." At pl. 35 and 36, after a further consideration of cases, and especially an elaborate examination of the famous case of *Pitt v. Pelham*, 1 Ch. Cas. 178, 1 Lev. 304, S. C., he concludes with this result: "It appears, therefore, to be well settled, that a power in a will to sell or mortgage, *without naming a donee*, will, *if a contrary intention do not appear*, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies. And, *it seems*, that whilst the chain remains unbroken, the power, until exercised, will go from him to his executors; and if the produce of the real estate is blended with the personal estate, the power to sell will vest in the executor *by implication.*" I repeat, therefore, that the whole is a search after the donee of a common law power. The simple reading of *Pitt v. Pelham*, shows that it is so. The dispute in this class of cases, and I appeal to them as collated by Sugden, is as to whom the deviser intended to confide the sale. Was it to the heir, to the executor, or some other trustee named in the will?

 Conklin v. Egerton's administrator.

Nay, did not the testator mean that the power should go both to his immediate executor and the executor of the latter, as successive donees of the power? He had power expressly to declare either, 1 Sugd. on Pow. 144, 5; id. 148, 149; but having omitted to speak, whom does he mean? The person being once named, however, as donee, either directly or by any terms of designation, then *expressio unius personae est exclusio alterius*. And whether the designation of the donee be by name, by other direct words, or by implication, he takes the power, not *as executor*, but *as trustee*. Accordingly, Mr. Sugden, in the very next breath, p. 138, pl. 37, says: "It remains to observe, that where the power is given to executors, they may exercise it, although they renounce probate of the will."

The doctrines we have been considering have long been settled. In H. 7, Y. B. fol. 11, b., which Mr. Sugden, No. 1, in App. to his treatise on powers, has saved us the labor of decyphering from abbreviated Norman French, it was argued, "that if a man has feoffees upon confidence, and make a will that his executors shall alien his lands, there, if the executors renounce administration of the goods, yet they may alien the land, *for the will of land is not a testamentary matter*, nor have the executors to interfere in this will, except so far as a *special power is given to them*. And if a man has feoffees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, there the ordinary shall not meddle with the land, nor the administrator neither, for the ordinary has *only to meddle with testamentary matters, as of goods*; and consequently *no more can the administrator, who is but his deputy*. And therefore it was lately adjudged in the exchequer chamber, by all the judges of England, that if a man makes a will of his lands, that his executors shall sell the land, and alien, &c., if the executors renounce administration and to be executors, there neither the administrators nor ordinary can sell or alien, &c. *Quod nota. Quod fuit concessum per Rede et Tremaille*, for good law. And if a man makes his will that his *executors* shall alien his land, *without naming their proper names*, if they refuse the administration and

Conklin v. Egerton's administrator.

to be executors, yet they may alien the land; *quod fuit concessum per Fineux et Tremaille*, for clear law. *Rede non dedit.* And if a man makes his will that his land which his feoffees have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, *per Rede, Tremaille & Frowik*. *Fineux* said nothing to this, this day; but the day before, he, in a manner, affirmed this. *Conisby* said that the *feoffees* shall alien this, for they have the confidence placed in them, &c. But this was denied, for *executors* have much greater confidence placed in them than the *feoffees* have; for the money to arise by the sale of the executors shall be assets in their hands, therefore they shall sell. *Fineux, Rede and Tremaille* said, that if a man makes his will that his feoffees shall alien his land, before the alienation the heir may take the profits, and they are seised to his use; and if an alienation be not made by them, the heir shall have the land forever." We here have the same search as is instituted by the modern cases, for the man whom the testator intended as his confidential trustee, the same inviolability of that confidence, when once ascertained; and above all, whether the person be expressed or implied, his rights are clear of all testamentary matters; letters from the ordinary can neither add to, nor the want of them take from his authority. He is a mere common law trustee or donee of a power. *Quoad hoc*, he is not executor. This is the same doctrine laid down by Chief Justice SAVAGE, in *Judson v. Gibbons*, and which has not been contradicted, but often re-affirmed, during an interval of 350 years. He treats it as forming an element in the judicial mind, for he cites no authority. It is presented as clearly in the pages of *Blackstone*, as by the labored analysis of the Norman lawyers, which we have read from Sugden's translation of the Year Book. The combination of the two powers in Hart can scarcely be resolved into their distinct and totally different natures, more plainly that it has thus been, by a school renowned for the elucidation of legal matters much more subtle and evanescent. The case is none the less striking because it was made before the statute of 21 and 34 H. 8, previous to which the only method of de-

Conklin v. Egerton's administrator.

vising land was by first making a feoffment to the uses of the will. A devise, whether before or since the statute, was but a mode of conveying real estate, with which an executor, as such, had nothing to do, even though the power of sale was conferred upon him by the same will which made him executor of the personal estate. The land, says the Year Book, is *not a testamentary matter*.

Whether, therefore, we regard Hart as the depository and distributor of a common fund arising from the avails of real and personal estate in his hands at the same time, or, as he really is, the mere instrument of a devise entirely distinct from the personalty, his acts, in respect to the land, were not and could not be performed in his capacity as executor; *quoad hoc* he was an agent acting under a private power of attorney. It is the same thing as if the testator had drawn up separate wills, the one of his personalty naming Hart as executor, and the other of his land naming him as the man to make a sale. In the first case only would he be executor, as deriving his powers from a peculiar system of laws, administered by the church, under forms from which alone he derived his powers, and a nomenclature which gave him his title; a system equally distinct for its unbroken continuity from remote antiquity. From the time of Henry 2 to Henry 8, the right of devising land as a part of the general law was suspended, as that of alienation in any other form was, for most of the same interval. Land was the substratum of the feudal system, where executors were necessarily unheard of, because successions to the heir must remain unimpaired; and when its fetters were broken, alienation, both by devise and otherwise, was regulated by the common law proper, under the action of its own distinct judicatories, and by a machinery and nomenclature to which executors were utterly unknown. For *testament*, was substituted the word *devise*; for *executor*, the words *trustee*, or *donee of a power*; and one appointed by will to sell land could with no more propriety be denominated an executor, than a *devisee* under the latter system, could be called a *legatee* in the vocabulary of the canon law. An executor is a creature of that law, and powerless and unknown to the

Conklin v. Egerton's administrator.

law which regulates the alienation of real property by will or otherwise. The two systems have descended to us, not merely with the same theoretical, but the same practical distinctness. A statute authorizes an *administrator* to sell land, in certain cases for the payment of debts; yet the very system of law to which that statute belongs, when it comes to consider the nature of his power or his act, will not allow it to be called or practically treated as the power or act of an *administrator*. He is then a *naked agent* for the sale of land, like the comptroller who sells for taxes. He is without interest, without inherent authority, and is the creature of the statute under which he acts, the same as the donee of a trust power is the creature of the statute of wills, or of the devise itself.

I must be excused for having several times repeated the distinction upon which I have conceived this case to turn, as it stands affected by various authorities and instances, ancient and modern. My first impression on the opening of the case, that the distinction still remained in all its force, continued notwithstanding the argument for the defendant in error. And I should, in the ordinary course, have felt little embarrassment in adopting it. But I was for a time led to doubt whether it had not faded from our system, when I saw it unhesitatingly repudiated by a high and learned court, to which the jurisdiction of trust powers has been more specially committed by the law.

On a bill in chancery, filed by Mr. Sherman to compel a specific performance by Conklin, now the plaintiff in error, the chancellor said, "Whatever doubts may have previously existed, there is no doubt since the revised statutes, that an administrator with the will annexed may sell real estate under a power contained in the will, in the same manner as if he had been named as executor therein. 2 R. S. 72, § 22. In this case the testator must have contemplated the event of Hart's surviving the widow, or that the power of sale and distribution should be made by an administrator with the will annexed, under the law then in force." In the application of the first remark to the case before him, the learned chancellor must have assumed as a matter of no

Conklin v. Egerton's administrator.

difficulty, that a man *nominated* to sell real estate in a will which appoints him executor, makes the sale *as executor*. He does not discuss nor even allude to the question whether he does not sustain a character entirely distinct, a character which in no propriety of legal speech can, as to this act of sale, be called that of an executor. The confusion of his two characters, I have before stated, as the undoubted ground of the difference which has arisen between the parties before us, who seem still to be litigating with great pertinacity, great confidence, and so far as the arguments of counsel before us are to be considered, with an ability and power which seem to justify that confidence. Although his honor the chancellor did not deem it necessary to discuss the question now very ably argued before us, how it has been argued elsewhere we know not, I have no doubt that we have the grounds of his opinion well put forward in the argument which has been submitted by the counsel for the defendant in error. I have considered that argument with the attention which it demands of itself, and, if possible, even more, from the respect due to it as embodying the reasons of the chancellor. Yet it will have been perceived, that the considerations which I have thought belonging to this case, have had an effect upon my mind far different from that produced on the minds of other judges. So far from feeling no doubt that the administrator may convey under the statute, I have been unable to resist the conclusion, that Mr. Hart's capacity as the donee of a common law power under the will, not being that of an executor in any legal sense, it cannot be made the subject of a statute which professes to translate the powers of an executor to another. My opinion is, both upon the words of the section in question and its intention as derivable from its history, its reason and context, that the legislature did not mean to confer on an administrator with the will annexed any greater power than they have provided that he shall give due security to perform. This, in no part of the revised system of administration, extends beyond the personal estate, or assets arising from a sale of real estate for the payment of debts.

 Frisbie v. Larned.

In respect to the chancellor's remark as to an *implied power*: I have also, as it will have been perceived, examined the cases, to see how far the testator Myers could be holden to have intended, under the old law, that on the premature death of Hart, the administrator should convey. That question has not been much discussed by the counsel. I have cited the former statute, which extends to the administrator with the will annexed its own provisions only. These do not touch the question; and I have been unable to find a single book which suggests that an administrator was ever considered as coming by implication within any clause by which a power of sale is devised even generally. But where the agent of sale is clearly pointed out by the devisor, I must be pardoned for supposing that all the cases and books which have spoken to the question, and there are many running through centuries, have denied that any room is left for legal implication. In *Wills v. Cowper*, as we have seen, it was held expressly, that an administrator with the will annexed could not execute a power to sell lands, which the will delegated to the executor; even though it was made in Virginia, which had a statute expressly transferring such authority; the land to which it related lying in the state of Ohio.

We are of opinion that the judgment of the court below should be reversed; a *venire de novo* to go from that court; the costs to abide the event.

 FRISBIE & M'KINNEY vs. LARNED & CORNING.

The acceptance of the *note* of a third person from one of the members of a firm, endorsed by him, together with the payment of the *balance* of the account against the firm in *cash*, is an accord and satisfaction of the demand against the firm; there being no agreement that such note was received merely as *collateral security*.

So a judgment confessed by one of the partners for the debt of the firm is a satisfaction.

THIS was an action of *assumpsit*, tried at the Rensselaer circuit, in September, 1838, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

Frisbie v. Larned.

In October, 1835, the plaintiffs sold goods to the defendants, who were in partnership as merchants, to the amount of \$149 67. In the spring of 1836, the partnership of the defendants was dissolved, M'Kinney agreeing to pay the partnership debts. In October, 1836, M'Kinney transferred to the plaintiffs a note made by one Williams for \$1 36, and paid them \$9 89 in cash, which note and cash were credited on the books of the plaintiffs, and the account against the firm balanced. The note of Williams was *endorsed* by M'Kinney; it was payable in six months, and when it became due it was protested, and notice given to the endorser. Subsequently to this event, M'Kinney contracted a further debt with the plaintiffs, and in October, 1837, executed a bond and warrant of attorney to confess judgment to the plaintiffs for the amount of Williams' note and his new indebtedness, on which judgment was entered. No execution, however, had been issued on the judgment, nor had any part of it been paid. The counsel for the defendants insisted that the plaintiffs were not entitled to recover in this action, because, 1. The acceptance of the note of Williams, under the circumstances of the case, was a bar to a recovery; and 2. That the taking of the bond and warrant and the entry of the judgment was also a bar. The judge overruled the objections, and *directed* the jury to find a verdict for the plaintiffs for the amount of the account against the firm with the interest thereof. The jury found accordingly, *subject to the opinion of this court* on a case to be made.

N. Hill, jun. for the plaintiffs.

A. C. Hand, for the defendants.

By the Court, COWEN, J. Williams' note, endorsed by M'Kinney, was received as payment. This is evident, from its being credited on the books, with the small sum of money paid at the same time, and the balance struck by the book. *Prima facie*, here was an accord and satisfaction. *New York State Bank v. Fletcher*, 5 Wendell, 85. *Booth v. Smith*, 3 id. 66. The reason why, in *Smith v.*

Frisbie v. Larned.

Rogers, 17 Johns. R. 340, the new note was not allowed as payment, in a case much like this, was, because the receipt of the note declared that *when paid*, it was to be credited. In the case at bar it was absolutely credited at the time.

The case is different from that where a party gives his own note for his own debt, which is receipted as in full. There, on default of payment, the creditor has his election to go back to the original cause of action, on surrendering the note to be cancelled. *Toby v. Barber*, 5 Johns. R. 68. *Schermerhorn v. Loines*, 7 id. 311. *Putnam v. Lewis*, 8 id. 389. *Burdick v. Green*, 15 id. 247. *Porter v. Talcott*, 1 Cowen, 359. *Muldon v. Whitlock*, 1 id. 290. *Raymond v. Merchant*, 3 id. 137. *Holmes v. D'Camp*, 1 Johns. R. 34. *Hughes v. Wheeler*, 8 Cowen, 77. The note, in such case, is not even *prima facie* satisfaction. But it is otherwise of a note against a third person, transferred by the debtor, or a note procured from a third person as surety, and accepted as satisfaction. This is apparent from the two cases already referred to in 3 and 5 Wendell. *Kearslake v. Morgan*, 5 T. R. 513, is a strong case to the same point. The following cases also go to support the same view: *Rew v. Barber*, 3 Cowen, 272, 280; *Whitbeck v. Van Ness*, 11 Johns. R. 409; *Everett v. Collins*, 2 Campb. 515; *Camidge v. Allenby*, 6 Barn. & Cress. 373; Sutherland J. in *Hughes v. Wheeler*, 8 Cowen, 79, 80; *Wiseman v. Lyman*, 7 Mass. R. 286, 290. I admit there is some confusion in the two classes of cases; especially in the reasoning by which some of them are sustained. The result of direct adjudication, however, is to treat the note of the debtor or his agent, as no farther affecting the original debt, than to fix the term of payment; and whether given simultaneously with the original contract, or afterwards; whether agreed to be taken as a satisfaction or not, it may be disregarded, and on cancellation, the original consideration be resorted to, if the note be not paid according to its terms. *Bill v. Porter*, 9 Conn. R. 23, 30, 31. In both cases, however, whether at the time or after the original debt was created, if security additional to the

Frisbie v. Larned

debtor's be required and taken, especially where a note of a third person is transferred by the debtor to and taken by the creditor, and credit is given for it as a payment, the effect is the same as the acceptance of a horse or other chattel on the same terms. If the note be endorsed, the debtor must be charged as endorser. If not, he is not chargeable at all ; as he would not be for the goodness of the horse if he has not warranted him. So, in both cases, he is chargeable if he be guilty of any fraud. The simple contract of sale, or claim on one side, and a promise to pay by the vendee or debtor, is departed from. A new and distinct contract is made, and new relations arise out of it. True the security may still be collateral ; but independent of proof affirmative that this is so, I think the intendment should be that the security was received in satisfaction. It is not necessary, however, to go so far in this case ; for here is express proof that the note was intended to operate as a satisfaction ; there was an endorsement credited as in full, and afterwards extinguished by a bond and judgment. This case seems to me to furnish quite as strong evidence of payment as *Arnold v. Camp*, 12 Johns. R. 409, which was a case of taking the note of one partner and giving up that of both. See also *Le Page v. M'Crea*, 1 Wendell, 164.

Above all, the evidence is quite too strong for the presiding judge to say, as he did virtually in this case, that there was not evidence even to go to the jury. *Johnson v. Weed*, 9 Johns. R. 310.

But a bond and warrant were taken for the precise debt, together with another debt, from one of the original debtors. These were either for M'Kinney's new liability as endorser, which would be farther evidence that Williams' note was intended as payment ; or it was for the original debt ; and then the bond itself being a security of a higher nature, extinguished that debt. *Tom v. Goodrich*, 1 Johns. R. 213. *Clement v. Brush*, 3 Johns. Cas. 181.

The reason why, in *Day v. Leal*, 14 Johns. R. 404, the bond was not allowed so to operate, was, because the parties agreed that it should stand *as collateral security* only at least this intent was supposed plainly to be collectable

Jenkins v. Brown.

from the whole transaction. *Prima facie* and unexplained, a security of a higher nature extinguishes a debt of an inferior degree. To meet that inference, it must be shown that the parties agreed to waive the legal consequence, either expressly or virtually.

Judgment for the defendants.

JENKINS vs. BROWN.

Notwithstanding the 47th section of the act relative to "courts held by justices of the peace," the justice may in his discretion, upon terms, permit a defendant to *come in and plead* who did not appear on the return of a *summons* which had been *personally served*, but subsequently appeared on a day to which the cause had been adjourned at the request of the plaintiff; but *being a matter of discretion*, a court of error will not review the decision of the justice, refusing leave to the defendant to plead, although upon the same state of facts, they would have relieved a party from his default.

ERROR from the Wayne common pleas. Brown sued Jenkins in a justice's court, by summons, returnable on the 27th July, 1836. The summons was returned personally served, and at the return day, the plaintiff appeared, and put in his declaration: the defendant did not appear, and the cause was adjourned, on the motion of the plaintiff, to the second day of August, then next. On the adjourned day the parties appeared; the plaintiff with his witnesses ready for trial; the defendant read and filed with the justice an affidavit excusing his default in not appearing on the return day, and generally of merits in the cause as advised by counsel, and offered to pay the costs of the adjournment and all subsequent proceedings, and to allow the plaintiff a further adjournment if he wished it, and, under the circumstances, asked leave to plead, and tendered a plea of the ~~general~~ issue with notice of some special matters, &c.

The plaintiff objected to the reading of the affidavit. The justice heard it read, but overruled the application, and refused to receive the plea; whereupon the defendant made no further defence, and the plaintiff proceeded to call wit-

Jenkins v. Brown.

nesses and assess his damages; and the justice rendered judgment against the defendant for \$50 damages and costs of suit. The cause was removed by certiorari to the Wayne common pleas, where the judgment of the justice was *affirmed*; whereupon the defendant sued out a writ of error. The cause was submitted on written arguments, by

C. D. Lawton, for plaintiff in error.

J. M. Holley, for defendant in error.

By the Court, COWEN, J. Mr. Lawton has submitted a very handsome, not to say a convincing argument, in favor of the justice's power to grant the plaintiff in error leave to plead on the terms which he offered. I am strongly inclined to think, with him, that notwithstanding the 47th section of 2 R. S. 165, 2d ed. and § 119 of the same statute, the justice might, on the cause shown, have given the leave without violating either the spirit of that section or any decision of this court; in short, that he had the same power in this respect as a court of record: which is to let in a defendant to plead at any stage of the cause, on terms such as shall save all reasonable chance of preparation to the plaintiff, while it subserves the purposes of justice by promoting a trial upon the merits, without dispensing with the exercise of proper diligence on the side of the defendant. Nor do I collect from the return, that the justice himself entertained any doubt of his power. All he tells us is, that he heard the defendant's affidavit, and overruled his motion; and this raises the question submitted to us on a writ of error. Now it appears to me, that by reversing the judgment, we should be obliged to deny one of the main positions for which the counsel for the plaintiff in error has contended: it is, that the justice's power is equal to that of a court of record, which may certainly grant or deny motions of this character *in their discretion*. To interfere with a justice's practice, would be to deny his discretion. If he violate a duty allowed or enjoined by statute, as in withholding an adjournment, or refusing to let in a party to plead, before

Jenkins v. Brown.

the time for adjourning or pleading has passed, we must interfere; but to do so for denying amendments, refusing opportunity to plead and the like, after the party applying has lost his legal right to the relief which he asks for, would be going beyond the office of certiorari, broad as may be its reach in reviewing the civil proceedings of the common magistrate. The affidavit on which the motion was founded was open to some criticism, though I think not much; and I entertain but little doubt, that sitting at a special term, either of us would, in the exercise of our discretion, have thought it right to let a defendant plead in a cause pending here originally, upon such an affidavit, on the usual terms. There is no law, however, absolutely requiring us to do it. We might have held that the indifference of the defendant in this case, as manifested, by his leaving every thing to a heedless agent, without any reason given, at least without any apparent necessity in his affairs, showed such a distrust of his power to defend on the merits as to discredit a general affidavit, and demand a more particular account of his alleged good defence. It is utterly unsafe in matters of discretionary practice, to interpose on writ of error by correcting the decisions of the inferior courts. The very reason why we cannot do it with safety is the one adopted by the law itself, when it declares that the inferior court shall act according to its discretion. It cannot lay down any precise rule to govern certain cases, according to their circumstances; and it therefore leaves the discretion of the court to form the law of each case as it arises. To say that a magistrate may act discretionally, is but another mode of saying that he is without control. He has a discretion upon conflicting evidence to find one way or the other, with which we never interfere; and there are many questions of a like character which arise in every court, whereon their decisions must be final.

It has often been held, that a bill of exceptions will not reach a decision which rests in discretion. In *Young v. Black*, 7 Cranch, 565, refusing to compel a party to join in a demurrer to evidence, was held not to form the subject of a bill of exceptions. I refer to this case particularly for

Shannon v. Comstock.

the sake of the reasons given by Mr. Justice Livingston at p. 569, who proceeded on the general ground that the reception of the demurrer was matter of discretion in the court below, and its rejection therefore could not in its nature be assigned for error; with him Story, J. concurred.

Judgment affirmed.

J. & S. SHANNON vs. COMSTOCK and others.

In an action to recover damages for the non-performance of a contract, other than for the conveyance of land, the rule of damages is the loss or injury sustained by the party ready and willing to perform, and not the price agreed to be paid on actual performance: the rule of law that a tender is equivalent to performance, applies only to the right of action, and not to the measure of damages.

It seems, however, that if the non-performance was not involuntary, but on the contrary was attributable to fraud or to a desire to benefit the party failing, that such circumstances may be taken into consideration to enhance the damages.

In a suit in a justice's court, on its appearing that a party who has been arrested on a warrant for the recovery of damages for the non-performance of a contract was not under the act to abolish imprisonment subject to arrest, it is the duty of the justice to dismiss the proceedings, although they were originally instituted on proof that the defendant was a non-resident.

A plea in a justice's court is not a waiver of objections previously taken and decided against the defendant.

A plea in abatement by two defendants, of a matter personal to one of them is bad.

It seems, that in an action against two, if the defendants be arrested, and one of them was not subject to arrest, the party entitled to exemption from arrest may claim to be discharged.

ERROR from the Washington common pleas. Comstock and three other persons, owners of a boat on the Champlain canal, commenced a suit by warrant in a justice's court against J. & S. Shannon for a breach of contract; the warrant having issued on an affidavit that the defendants were non-residents of the state. The defendants were arrested and brought before the justices. The plaintiffs declared on a contract entered into between them and the defendants, whereby they had engaged to transport a number

Shannon v. Comstock.

of horses for the defendants in a canal boat from Whitehall to Albany, for the consideration of *fifty-five dollars*, to be paid to them by the defendants. The plaintiffs averred a *readiness and offer to perform* on their part, and a neglect and refusal on the part of the defendants. Before pleading to the declaration, the defendants moved to quash the proceedings, on the ground that they were residents of the city of New York, and *not subject to arrest by warrant*; the plaintiffs, for the purpose of the motion, *admitted* that the defendants then were, and for more than thirty days had been residents of the town of Granville, in the county of Washington. The justice refused to grant the motion. The defendants then *pleaded in abatement* that *Joseph Shannon*, one of the defendants, at the time of the commencement of this suit, was, and for more than thirty days preceding had been a resident of this state; to which plea the plaintiffs *demurred*, and the justice decided the plea to be bad. The defendants then pleaded the *general issue*, and the parties proceeded to trial. The plaintiffs proved the contract as laid in the declaration, and that it was made on the *second day of June, 1836*, and that the horses were to be embarked on the *third day of June*. On the *third*, about a dozen horses were embarked; but after their embarkation, they were so restive that it was *impossible* to keep them on board the boat, and after remaining on board about an hour, the defendants took them off, and abandoned the idea of transporting the horses in that manner. The defendants inquired of a witness as to the probable amount of damages sustained by the plaintiffs, in consequence of the contract made with the defendants, and the inability on their part to carry it into effect: which inquiry was objected to by the plaintiffs, and overruled by the justice. The defendants offered to prove that the damages sustained by the plaintiffs did not exceed *five dollars*: which evidence was also objected to, and excluded. The justice charged the jury, that the plaintiffs having shown a *readiness and offer to perform* the contract on their part, and a neglect or refusal on the part of the defendants, were entitled to recover the *contract price*. The jury found a verdict for the plain-

 Shanno v. Comstock.

tiffs for *twenty-five dollars*, on which the justice rendered judgment. The common pleas of Washington, on *certiorari*, affirmed the judgment; whereupon the defendants sued out a writ of error.

E. D. Culver, for the plaintiffs in error.

L. Gibbs, for the defendants in error.

By the Court, COWEN, J. Upon the motion to quash the warrant, the plaintiffs before the justice admitted that the defendants were residents of Granville, in Washington county, and had been so for more than thirty days before the warrant was taken out. The justice had jurisdiction of the process, and the affidavit on which the warrant issued made it regular in the first instance. But certainly the affidavit was not conclusive. It was still open to be met by the defendants, on proof that it was made under a plain mistake. That was admitted, and the justice should, therefore, have dismissed the suit; or, to speak more technically, he should have set aside the proceedings for irregularity.

I admit the plea in abatement was bad. It went to the whole suit, for a cause personal to one of the defendants only. It was therefore bad as a plea, whatever it might have been as a motion. *De Forest v. Jewett*, 1 Hall's R. 137. I am inclined to think that where two persons are arrested in a suit against both jointly upon a contract, and one is a resident of this state and has been for more than a month, he must be discharged. But let that pass.

Nor is it any answer that the defendants finally pleaded in bar. Such an answer must rest on the ground of voluntary waiver; here the propriety of the arrest was questioned at once, on admitted facts, and the defendants were compelled to plead over.

Again: the *rule of damages* was mistaken. The defendants were indeed bound to furnish the proposed freight in horses, and the plaintiffs were ready to take it at the \$55 agreed to be given; but it by no means follows that the latter was the sole measure of damages. The plaintiffs

Shannon v. Comstock.

tendered their labor, which it was impossible for the defendants to avail themselves of. Suppose the plaintiffs had *the next hour* been furnished with freight entirely adequate to the voyage, at the same sum; they then would have been entitled to the damage arising from detention for that time, but no more. The authorities cited for the defendants in error are altogether misapplied. They go to show, what no one will dispute, that a tender and offer to perform is equivalent to performance. But that is merely for the purpose of sustaining an action. It is a rule of pleading in which you do not aver performance. If it were actual performance, you need not even declare specially. This shows that it is not performance, though in one respect it resembles it consequentially. In this, it is *quasi* performance; but it does not regulate the amount of damages. A man agrees to convey his farm, and the money is tendered; but he cannot give a title; this is not a case for damages even for the loss of a good bargain; but the damages would be merely nominal. Yet if the tender were the same in respect to damages, as a performance, that is to say, actual payment, the vendee might keep his money and recover the value of the thing. See *Baldwin v. Munn*, 2 Wendell, 399, and per *De Grey*, C, J, in *Fleureau v. Thornhill*, 2 Black. R. 1078. Suppose the defendants below had, on the very day of the contract, given notice to the plaintiffs that they could not furnish the horses, and should not attempt to do so; it is equally well settled that the plaintiffs might have recovered damages, without any tender or offer to perform on their part. In such case, or where it becomes impossible for one party to perform, the other side is absolved from all obligation to move and may sue immediately. That too is considered equivalent to a performance by the side which is not in fault. And yet shall it be said that the whole sum to be paid for actual performance may be recovered? Suppose in the case of the covenant to convey a farm for a specified sum, and a deed tendered but refused, and the vendor sells to another, shall he yet recover the whole price of the original vendee? I admit that in some cases, where property is so tendered, and the tender is not withdrawn, the price may

Shannon v. Comstock.

be recovered; but this is on the ground that the thing sold has an independent existence, and the corpus not being perishable, and having legally passed by the tender and subsequent recovery, may still be actually delivered over whenever the vendee shall demand it. That was held where a deed had been tendered in *Alna v. Plummer*, 4 Greenl. 258. The same rule was applied to goods, in *Bement v. Smith*, 15 Wendell, 493. The vendor was to make a scrikey, deliverable at a certain time and place to the vendee. It was finished and tendered, but refused, and the vendor told the vendee he would leave it with De Wolf, who resided in the neighborhood. The vendor was allowed to recover the price. This court held that he had his election to resell, and recover what he lost by the resale, or make the tender and keep it good, and recover the whole original price agreed. But the distinction between that case and the one at bar is very obvious. Here we have a contract to sell labor and services. On the vendee declining them, the vendor sells them to another or converts them to his own use: in other words, he goes about his business in another direction, which fetches him the same or nearly the same, or more, perhaps, than the agreed price, which has failed. This is necessarily so, unless the vendor of the labor choose to lie idle, for the supposed length of time which performance would have demanded. But that he has no right to do. The rule of this subject is well laid down by Mellen, Ch. J. in *Miller v. Mariner's Church*, 3 Greenl. 51, 55, 56. "In general the delinquent party is holden to make good the loss occasioned by the delinquency. But his liability is limited to direct damages, which according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions and other expenses of resale, from the purchaser. If the party entitled to the ben-

Shannon v. Comstock.

effit of the contract can protect himself from the loss arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his social duty, if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable." The reason and justice of these remarks are open to continual illustration in the affairs of men. A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month. Clearly his loss is but one day; and it is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud, which the law had rather punish than countenance. "Damages and interests," says the civil law and the continental writers, "are the loss which a person has sustained, or the gain which he has missed." 1 Ev. Poth. 90, Lond. ed. 1806.]

In the case at bar, it is hardly possible that the deck of the plaintiffs' boat could have remained entirely useless and unprofitable, during all the time necessary for a trip to Albany. The jury, I perceive, notwithstanding the total exclusion of evidence, and the rigor of the rule laid down by the magistrate in his charge, reduced the damages to less than one half the contract price, probably on the general knowledge which they had of the facilities for engaging freight at Whitehall, and thereby avoiding the injury arising from disappointments like that in question. Clearly the defendants should have been allowed, as they offered, to show that a farther reduction would have been just. The loss arose from their mere misfortune. If they had acted selfishly or fraudulently, this would have made a shade of difference against them. But all the witnesses concur that the failure was from causes which the defendants could not have anticipated, much less have controlled. The judgments of the courts below must be reversed.

Ordered accordingly

 Burlingham v. Belding.

BURLINGHAM vs. BELDING.

A devise of lands without words of perpetuity, in a will made previous to the revised statutes, will not be construed to give a fee by implication, although there be a personal charge imposed upon the devisee, if there be a fund other than the realty, to which the devisee may look for indemnity, and in immediate connection with which the charge is imposed.

THIS was an action of *ejectment*, tried at the Dutchess circuit, in October, 1833, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The plaintiff, *Catharine Burlingham*, one of seven children of *Silas Belding*, deceased, claimed an equal undivided seventh part of three tracts of land in the possession of the defendant, who claimed the premises under a devise in the will of *Silas Belding*, executed in 1786, whereby the premises were devised to *Lawrence Belding*, the father of the defendant, *without any words of perpetuity added to the devise*. The defendant claimed that his father took a fee by implication. The will commenced in these words: "First, I give to my loving wife Janatie, my house wherein I now live, with all my live stock of horses, cattle, sheep, and swine; with all my carriages, farming tools and utensils, during her natural life. All which goods and chattels are then, after my said wife Janatie's decease, to pass to and be the property of my son Lawrence, who is to take care of his mother during her natural life." Next the testator gives to his son *Silas*, four tracts of land, particularly describing them, without any words of perpetuity. Next he gives the three tracts in question to his son *Lawrence*, without any words of perpetuity. Next he gives a tract of land to his daughter *Mary*, without any words of perpetuity. Next he gives a tract of land unto the heirs of his daughters *Abigail* and *Catharine*, without words of perpetuity, but directing the same to be equally divided between such heirs, *per stirpes*. Next he gives a certain other tract to his daughters *Jane* and *Elizabeth*, without words of perpetuity. Then follows a clause in the words: "And it is my will and

Burlingham v. Belding.

pleasure that my wife Janatie shall have the use and benefit of my *negro man and woman*, during her natural life, and *after her decease*, I give them to my son Lawrence." After which, he gives his household goods and furniture to his three daughters, Mary, Jane and Elizabeth, to be equally divided between them, six months after his wife's decease; the same to remain to his wife's use and care during her natural life; and as to what *cash* he has, and what may be due to him at his decease, after his funeral charges and lawful debts shall be paid, he gives it to his two sons, *Silas and Lawrence*, and to his three daughters, *Mary, Jane and Elizabeth*, to be equally divided between them; and then concludes in these words: "And I make and ordain my said wife *executrix* of this my last will and testament; and also, I make and ordain my son *Lawrence* and my son-in-law Christopher Dutcher, *executors, in trust, for the intents and purposes in this my last will and testament contained, to take care and see the same performed*, according to my true intent and meaning; and I also give to my sons *Silas and Lawrence*, all my wearing apparel, to be equally divided between them. In witness," &c. *Janatie*, the wife of the testator, outlived her husband thirteen years; after her husband's death, she resided with her son *Lawrence*, and was kept and supported by him during her life. The *house* given to her during her life, was on that part of the premises devised to her son *Lawrence*, who on the death of his father took possession of the premises devised to him, and continued in possession until his death, about *six years* before the trial. The other devisees also took possession of the several shares devised to them. The judge charged the jury that under the will of the testator, Lawrence Belding took only a *life estate*, and that the plaintiff was entitled to recover. The jury accordingly found for the plaintiff, and the defendant, on a *bill of exceptions*, moved for a new trial.

C. W. Swift & H. Swift, for the defendant.

A. Forbis & L. Maison, for the plaintiff.

Burlingham v. Belden.

By the Court, COWEN, J. It is conceded by the defendant's counsel, that the clause in the will of the testator Silas Belding, by which he devised the premises in question to his son *Lawrence*, when considered *by itself*, carried no more than an estate for life; and that the will cannot be made to carry a fee, unless it fasten some personal charge upon *Lawrence*, *in respect to the land devised to him*. That the will in a distinct previous clause, imposes a personal charge upon him to some extent, which is comprised in the words "who is to take care of his mother during her natural life," is agreed by both sides. But this imposition is in immediate connection with a bequest of *personal property*. Had the bequest been a *devise*, though with *life words* merely, then, according to the cases cited by the defendant's counsel, there cannot be a doubt, that such imposition would have been operative to enlarge it, by construction, into a fee. The devise to *Lawrence* is *subsequent*, and as completely distinct in terms from the personal imposition, as the intermediate one to *Silas*, or those to subsequent devisees. The testator also made bequests to *Lawrence* in a still subsequent part of the will, equally disconnected with the imposition, so far as words are concerned.

Every devise and every bequest, when taken by themselves, import a bounty, and they cannot be turned into a bargain for payment of money or personal services without plain words, or necessary implication from the context, that the duty required was in consideration of the devise or bequest. *Spraker v. Van Alstyne*, 13 Wend. 578, and 18 Wend. 200, S. C. on error, goes the farthest of any case I have seen in raising this implication. The difference between this court and the court of dernier resort, in that case, was, whether the will was to be so construed as to fasten a personal burthen upon the devisee at all. That point being reached in the court of errors, the inference was not difficult, that it must have been by reason of, or in respect to the interest communicated, to the devisee. There, as the will passed nothing to *Martin Van Alstyne*, except the land devised, with 30 shillings by reason of his primogeniture, the personal estate being bequeathed to another; and as the

Burlingham v. Belden.

court of errors inferred that he was left with the burthen upon him of paying debts, or a portion of them, they thought that, in sound construction, the burthen had reference to the land. This was the method by which that court brought the case within the pale of such British and American authorities as erect a fee upon a personal charge *connected* with a devising clause which would otherwise carry but an estate for life. This *connection* alone is, in the case at bar, the point of dispute; for here is not, as in the case of *Spraker v. Van Alstyne*, a declaration that any one of the heirs should be content with what was given him. See 18 Wend. 207, per Walworth, Ch., on the authority of *Butler v. Little*, 3 Greenl. 207.

What then is the natural unsophisticated meaning of this will? I think the testator here has not left us to the office of construction; but has himself expressly declared, in the very outset of his will, the consideration upon which the *care* was to be bestowed by Lawrence. He had bequeathed to his wife, for life, his dwelling house, stock, carriages and farming tools; and then added, "*all which goods and chattels are, then, after my said wife's decease, to pass to, and be the property of my son Lawrence, who is to take care of his mother during her natural life.*" I understand the testator here plainly to say, that the *care* was a consideration of the remainder which Lawrence was to take in the personal property. It was but another form for the usual expression in common life: "the goods and chattels are to be A. B.'s, who is to take care of his mother;" or "the goods and chattels of the farm are to go to A. B. the son, who is to take care of the old folks." The import is equally obvious as if the clause had concluded, "*because* he is to take care," &c. The defendant contends that he was to have the land for the same reason. The argument cannot be sustained without judicial interpolation. The will tells us no such thing; but has cut off all chance of inferring it. That gives us one reason only; and we are called upon to add another. The subsequent declaration of a trust in Lawrence, as executor, to see the will executed, beside being common to him and the other executor, *Dutcher*, is a mere

 Edwards v. Farmers' Fire Ins. & L. Co.

suggestion of their duty as trustees, all or most of which, the law would attach to their office of executors. Again, that duty has no apparent connection with the devise. There is not, as in *Spraker v. Van Alstyne*, a devise and *nothing else*, which can be looked to as an equivalent for the burthen imposed. On the contrary, another fund, the remainder in the personal property, is *expressly*, at least *plainly* indicated as the *sole equivalent*. I do not stop to show, that there are no such operative words in the devising clause itself, as will carry a fee; because, as I remarked before, this is admitted. I will only add that it is clear upon all the authorities.

The verdict directed by the circuit judge was right; and a new trial must be denied.

New trial denied.

 EDWARDS vs. THE FARMERS' FIRE INSURANCE AND LOAN COMPANY.

Under a clause in an act of incorporation of an insurance and loan company in these words, "that in all cases where the said corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption of any such property on payment of the principal, interest and costs, *so long as it remains in the hands of the said corporation unsold*;" IT WAS HELD, that a mortgagor's right of redemption *continued*, notwithstanding that a contract for the sale of the mortgaged premises had been entered into and duly executed by the company, one third of the purchase money paid, and possession taken by making surveys, &c.; and that such right of redemption could be extinguished only by the execution and *delivery of a deed* of conveyance to the purchaser, who must be deemed to have contracted with notice of the rights of the mortgagor.

A purchase by an agent of the company, of lands on which they had made a loan, is a purchase by the company, within the meaning of this act.

A contract for the sale of lands is valid, within the statute of frauds, if it be signed by the party to be charged therewith; it is not necessary to its validity that it should be signed by both parties.

A tender after the day, stipulated for the payment of a debt secured by mortgage, is equally effectual to remove the lien of the mortgage from the land as a tender at the day, provided it be made before foreclosure; and if the mortgagee be in possession, he may, after the tender, be ousted by the

Edwards v. Farmers' Fire Ins. & L. Co.

mortgagor. If the tender be not made until after the day stipulated for payment, the mortgagor is bound to pay such costs as have accrued. Where premises are *unoccupied*, parties *claiming title* thereto, or some interest therein, may be *named as defendants* in an action of *ejectment*; and they are not permitted to complain that others should have been made defendants instead of themselves, if, when applied to on the subject, they omitted to set the plaintiff right. *It seems*, that sometimes the plaintiff in ejectment has an *election* as to defendants.

THIS was an action of *ejectment*, tried at the Erie circuit in July, 1837, before the Hon. ADDISON GARDNER, then one of the circuit judges.

The action was brought to recover certain premises which had been *mortgaged* by the plaintiff to the defendants, and which had been bought in by the defendants at a master's sale, in pursuance of a *decree of foreclosure* of such mortgage, and subsequent to which sale the plaintiff had *tendered* to the defendants the full amount of the moneys due upon the mortgage, and the costs of foreclosure: whereby the plaintiff contended, *under the circumstances of the case*, that he had become entitled to be restored to the *possession* of the premises. On the 1st November, 1823, the plaintiff executed to the defendants a mortgage of *nine tracts of land*, situate in the county of Erie, to secure the payment of the sum of \$15,000, with the interest thereof, on the 1st January, 1825. On the 12th November, 1832, the defendants filed a bill in chancery for the foreclosure of the mortgage, and on the 29th January, 1833, a decree of foreclosure was made, and the mortgaged premises directed to be sold, the amount due to the defendants having been reported to be \$13,652. The mortgaged premises were sold on the *27th August, 1834*, in sundry parcels to various persons, the amount of sales being \$12,117 86, leaving a balance due, of principal, interest and costs, amounting to \$3514 92. Three of the tracts and portions of two others were bought by *Elisha Tibbets* and struck off to him for the sum of \$6910, and deeds were duly executed to the purchasers. On the 25th June, 1835, the defendants made a *statement*, exhibiting a balance of \$10-024 67 still due to them, after crediting the above sum of \$6910 and the other bids at the sale, together with a pay-

 Edwards v. Farmers' Fire Ins. & L. Co.

ment made by the plaintiff. On the same day that the above statement was exhibited, the plaintiff *tendered* to the President of The Farmers' Fire Insurance and Loan Company \$10,500 in *redemption* of the lands purchased in by *Elisha Tibbits*, and offered to pay forthwith any further sum, if the above was not enough, to satisfy the principal, interest and costs due to the defendants.* He also *tendered a conveyance* to be executed by the company releasing and conveying to him the lands purchased by Tibbits at the sale. The president of the company declined to receive the money tendered and to execute the conveyance, *for the reason that the company had made a contract to sell the land*. The money was laid on a table, and when declined to be accepted by the president was taken up by the plaintiff, and has not since been kept as a separate fund.

On the part of the defendants it was shown, that on 17th March, 1835, articles of agreement were entered into between the defendants of the one part, and *William T. Mer-*

*The defendants are an *incorporated company*, and were incorporated in 1822. Statutes of 1822, page 47, *et seq.* and amendments to original act, Statutes of same year, page 254. The third section of the act of incorporation is in these words: "*And be it further enacted, that any such loans on bond and mortgage, or other securities on real estate, shall not be made payable in a shorter time than one year, and the interest payable annually, and the said corporation shall not foreclose any mortgages or securities until after the expiration of five years after the date of such mortgage, provided the interest thereon is punctually paid; and that, in all cases where the said corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption of any such property on payment of the principal, interest and costs, so long as it remains in the hands of the said corporation unsold; and the said mortgagor shall also have the privilege of paying to the said corporation, at any time when the interest shall become due, any part of the principal of such loans. And it is further declared, that the said corporation shall be bound to sell and dispose of any real estate that may be purchased by virtue of this act, except such as may be necessary for their accommodation in the transaction of their business, within five years after it acquired the same, and shall not be capable of holding the same after the expiration of the said five years, but the same shall immediately after the expiration of the said five years be forfeited to and vested in the people of this state; and further, that all sales under the mortgages, to be taken or holden by the said corporation as aforesaid, shall be made in the county where the said mortgaged property shall be situated.*"

Edwards v. Farmers' Fire Ins. & L. Co.

ritt and Isaac Merritt of the other part, whereby the defendants, in consideration of \$13,000 to be paid to them, covenanted and agreed to grant and convey unto the parties of the second part, the premises purchased by *Elisha Tibbits* at the mortgage sale—the conveyance to be executed within a reasonable time after the *legal title* of the premises should be vested in the company; the whole of the *equitable estate* in the premises being declared to be then vested in the company. The Messrs. Merritt covenanted on their part to pay to the company for the property thus to be conveyed \$13,000—one-third thereof on the 1st May, 1835, and the residue in five years, to be secured by bond and mortgage. There was a mutual stipulation that the Messrs. Merritt might take immediate possession of the premises and receive the rents, issues and profits thereof to their own use. This instrument was executed thus: "James Tallmadge, Pres. pro tem. L. s. William T. Merritt, for Isaac Merritt. L. s. Wm. T. Merritt. L. s." On the 1st April, 1835, the Messrs. Merritt *paid the first instalment* provided for in the contract. The reason why a conveyance was not immediately executed to the Messrs. Merritt was, that the property had been conveyed by the master who conducted the sale of the mortgaged premises, to *Elisha Tibbits* individually, and he had died in the month of *February* preceding the date of the contract, without having conveyed to the company. At the time of the purchase he was president of the company, acted as its *agent* in the purchase of the property, and the money of the company was appropriated in satisfaction of the bid made by him for the same at the master's sale. In May, 1835, the Messrs. Merritt proceeded to Buffalo to see the property purchased by them; they went on to it and directed it to be divided into lots and a map thereof to be made, which was accordingly done; they also directed a sewer or ditch to be constructed for draining a portion of the land, which was also done; they claimed to be the owners of the property, entered into a contract for the sale of five lots, and offered other portions of the property for sale. The premises were *unenclosed* and unoccupied *lands*, situate at Black Rock, having always

Edwards v. Farmers' Fire Ins. & L. Co.

laid open as commons since the first settlement of that part of the state, except a small piece of about two acres, in the possession of a man of the name of *Wolfe*, who had occupied it for a few years. The defendants procured conveyances to be executed to them of the premises in question by the *executors* and *widow* of Elisha Tibbits, but the Messrs. Merritt not being satisfied with the title thus obtained, on 3d July, 1835, filed a bill in chancery, before the vice chancellor of the first circuit, to *compel a specific performance* of the contract, in which they made the defendants in this cause and the *heirs* and *personal representatives* of Elisha Tibbits defendants; and on the 8th December, 1835, a specific performance was decreed and deeds were directed to be executed by the *heirs at law* of Elisha Tibbits to the Messrs. Merritt, and also by the present defendants, in pursuance of the contract entered into by them with the Messrs. Merritt. In pursuance of this decree, *deeds* were executed by the heirs of Tibbits and by the present defendants to the Messrs. Merritt, dated 16th December, 1835, and the Messrs. Merritt executed a *mortgage* to the defendants to secure the payments of \$8600, the balance of the purchase money as specified in the contract of 17th March, 1835. The plaintiff further proved, that on the 5th September, 1835, notice was duly served upon the Messrs. Merritt of the *tender* made by him to the defendants on the 25th June preceding, and of the *demand* made by him for a deed.

Upon the facts as above stated, *the principal questions* in this case arise; but there were several minor points agitated in the course of the trial, necessary to be stated. For the purpose of showing that the defendants in this case *were properly made defendants*, the plaintiff offered in evidence a *deposition* made by *Hugh Maxwell, Esq.* which it has been agreed might be read in evidence subject to exception, to show that the plaintiffs *claimed* title to the premises. The defendants' counsel objected to its being received in evidence for that purpose, but the objection was overruled. The witness stated in the deposition the *answer* made by the president of the company when the plaintiff made the *tender* of the sum of \$10,500 and demanded a deed, viz. *that the*

Edwards v. Farmers' Fire Ins. & L. Co.

company had made a contract to sell the land. After proving *this fact*, the *tender* and reading in evidence the *mortgage*, the plaintiff rested. Whereupon the defendants moved for a *nonsuit*, on the grounds, 1. that they had not been shown to be in possession of the lands claimed, or that they were *unoccupied*, and that the defendants claimed title thereto at the commencement of the suit; 2. that the *tender* was not sufficient; and 3. that the plaintiff, by the production of the mortgage, had shown title in the defendants: which motion was overruled by the circuit judge.

When the defendants offered to read in evidence the *contract* of 17th March, 1835, the plaintiff objected to its being received on the grounds, 1. that no *authority* had been shown from the board of directors to the president pro tem. to execute the contract; and 2. that no *authority* to *William T. Merritt* had been shown to execute the contract as the attorney of *Isaac Merritt*: which objections were also overruled by the circuit judge.

The evidence being closed, the circuit judge rose to deliver his charge to the jury. Before doing so, the plaintiff disclaimed all right to recover in this action the two acres in the possession of *Wolfe*; whereupon the judge instructed the jury that the purchase by Tibbits was made for the defendants and whilst the property remained in his hands or in the hands of the defendants, the plaintiff under the provisions of the act incorporating the defendants had the right to redeem; that the *tender* made by the plaintiff caused the *legal title* to revert to him, and extinguish *the lien on the land* for the sum due from the plaintiff, and that the defendants must look to the *personal responsibility* of the plaintiff for the balance of their debt; that the sale to the *Merritts* did not defeat the plaintiff's right to redeem—that it was only *a contract to sell*, and not *an actual sale*; that as long as the property had not been *actually conveyed* to the *Merritts*, the plaintiff's right to redeem could not be affected by the contract, and the subsequent efforts prior to the tender (which were ineffectual) to perfect that sale; that if the defendants could make contracts for the sale of lands purchased in, to be consummated at a future day, it would be in fraud

Edwards v. Farmers' Fire Ins. & L. Co.

of the rights of mortgagors secured by the statute under which the defendants acted ; that the tender of the plaintiff was sufficient, and that it was not necessary to keep the money separate from other funds, nor to bring it into court ; and that the action was properly brought *against the defendants* : the acts of the *Merritts* in relation to the land not being sufficient to constitute them possessors ; their possession not being such an actual possession or occupation as to make it necessary to have brought the action against them. Whereupon the jury, under the direction of the judge, found a verdict for the *plaintiff*. The defendants, on a *bill of exceptions*, moved for a new trial.

E. Sandford & G. Wood, for the defendants, insisted on the following points :

I. The judge erred in permitting the plaintiff to show that the defendants *claimed title* to, or some interest in, the premises in question at or before the commencement of the suit ; there being no proof that the defendants were in possession, or that the premises were unoccupied.

II. The judge erred in refusing to grant the motion for a *nonsuit* ; the grounds of the motion being stated in the bill of exceptions.

III. The charge of the judge was erroneous in stating : 1. That the provisions in the *charter* of the defendants rendered the sale and foreclosure of the mortgaged property a *continuation* of the mortgage, and that the plaintiff consequently had a right to redeem ; 2. That the *tender* was sufficient, and caused the legal title to revert to the plaintiff ; 3. That the sale to the *Merritts* did not defeat the plaintiff's right to redeem ; that as long as the property had not been *actually conveyed* to the *Merritts*, the plaintiff's right to redeem was not affected by the contract or the subsequent ineffectual efforts to perfect the sale.

IV. That the question of possession of the *Merritts* should have been submitted to the jury, and not decided by the judge.

Roger M. Sherman, for the plaintiff, insisted upon the following points :

Edwards v. Farmers' Fire Ins. & L. Co.

I. Had there been no sale or foreclosure, a *payment* by the mortgagor, accepted in full by the mortgagees, after forfeiture at law, the mortgagees being in possession and refusing to release the legal title, would have enabled the mortgagor to bring ejectment; for by the *modern* law of England, and of New York, a satisfied mortgage is no bar to an ejectment by the mortgagor, brought either against the mortgagee or a stranger. In support of which position the counsel cited 2 Burr. 969; 5 Peters' U. S. R. 481; 1 Strange 413; Barnardist. Ch. R. 90; Dougl. 632; 1 East, 288; 4 Johns. R. 41; 18 id. 7; id. 110, and Powell on Mort. 170, there cited; 1 Caines' Cas. in Er. 69; 14 Ves. 128; 2 Cowen, 195; 11 Wendell, 537; 1 R. S. 721, § 45, 47. By § 3, of the act of incorporation of the defendants, the *law day* is extended.

II. A *tender*, as well as a *payment*, after forfeiture, will enable the mortgagor to bring ejectment against the mortgagee or a stranger. Bacon's Abr. tit. Tender, F. Littleton, § 338. Co. Litt. 208. 18 Johns. R. 110.

III. The effect of the *tender* was not impaired or varied by the master's sale to Tibbits. By § 3, of the act of incorporation of the defendants, the *law day* is extended, and the right of the mortgagor preserved.

IV. The *covenant to convey* to the Merritts did not impair the plaintiff's right to redeem; it was a mere *executory contract*.

V. Payment by the Merritts of *part of the purchase money*, even if followed by possession, adds no strength to their claim, for it is still an executory agreement only and not a sale. It equally lacks the character exacted by the charter. The right of the Merritts in equity against the defendants was as perfect *before* the first payment as afterwards. The plaintiff's right to redeem, therefore, by payment or tender, was not varied by any part performance by the Merritts.

VI. The contract with the Merritts was not only executory, but could not be enforced against the defendants, because not duly executed by one of the Merritts.

In support of the *fourth point*, the counsel insisted that the conveyance to the Merritts, long after the tender, pursuant to a decree in chancery, cannot affect the plaintiff's rights, as they had previously vested, and he was *not a party to the bill*. The right to redeem is preserved, after the sale by the master, and purchased by the corporation, "so long as it shall remain in the hands of the *corporation unsold*."

There was *no sale* to the Merritts, but only *an executory contract to sell*. But it has been said, that this is a sale within the intent of the charter. The equitable maxim, "that what is agreed to be done shall be considered as done," is not intended as literally true; but means only, that the covenantor, or promissor, shall not be benefited by his own neglect to fulfill his undertaking. But the contract of the corporation with the Merritts, is not a sale within the maxim, or in any other sense; for 1. The plaintiff is not a party to the covenants, nor does he hold under the corporation. He is not, therefore, bound by the covenants. He needs but to *disencumber his old title*, not to acquire a *new one*. He owned the land, subject only to the condition, as modified by the master's sale, according to the charter. The tender fulfilled that condition, and left his own estate unembarrassed. He is *in* of his old title. 2. A power conferred by statute to destroy the title of another, must be *strictly pursued and fully executed*. The corporation might defeat the title of the mortgagor only by *a sale*. 3. The contract with the Merritts was not a sale, either within the strict requirements of the charter, or according to any legal, or even equitable sense. A sale operates *in rem*—a covenant *in personam* only. If A. covenants to convey to B., the latter cannot bring ejectment, even after full performance on his part. But he might, if, at law what ought to be done is considered as done, in the sense contended for by the defendants. Even a court of chancery cannot *pass the title*, but only decree *in personam*, unless authorized by statute. 4. A *sale* binds a *subsequent purchaser without notice*; but a *contract to sell* does not. 5. If a contract to sell was a sale, and "what ought to be considered as

Edwards v. Farmers' Fire Ins. & L. Co.

done," chancery would not decree its execution. It would be already executed. 6. At the time of the tender, this could not be considered as a contract executed; for the time had not arrived when it "*ought to be done.*" The corporation had not been able, by reasonable diligence, to obtain the legal estate of Tibbits. That required a bill in chancery, as some of the heirs were minors. The land cannot be considered as *sold* by the corporation, when they *could not sell it*, and were not bound to, by the terms of the covenant. 7. The covenant vested no superior equity in the Merritts. They did not claim *under the plaintiff*, but *under the corporation*; to whose rights the plaintiff's title was *paramount*. It was prior in time, being coeval with the mortgage. It was superior in right, not only because it was older, but it conferred on the plaintiff the power of destroying at any time, the title of the corporation. The plaintiff was owner for *every beneficial* purpose; the corporation could claim it for no purpose but *mere security*. The plaintiff had in it *a freehold of inheritance*; but the corporation held it as a *mere personal chattel*. (See the authorities above cited.) The plaintiff's right was that of saving a forfeiture of his estate by a just fulfilment of the conditions annexed to it; but the Merritts, with *full knowledge of the pre-existing rights of the plaintiff*, were mere *voluntary* contractors, to buy at a *future day*. The equity of the plaintiff, were the claims of the parties depending in a court of chancery, would be in all respects superior to those of the Merritts. But the charter secured to the plaintiff a right to redeem *at law*, of which nothing short of an *actual* sale could divest him. 8. Under the master's sale, the rights acquired by the corporation by their purchase, were just the same they would have been, had the power of foreclosure by sale been given in a mortgage, as authorized by statute, 2 R. S. 545, 546, and that power been extended to a private sale. In that case, an executory agreement to sell would not have foreclosed the mortgagor; an actual sale would be necessary. In this case, as in that, the power must be strictly executed. 9. The provision of the 19th section of the charter, that it "shall be construed, in all

Edwards v. Farmers' Fire Ins. & L. Co.

courts and places, benignly and favorably to effect the ends and purposes hereby intended and contemplated," strongly sustains the superiority of the plaintiff's claim over that of the Merritts. In the preamble, the *accommodation of borrowers* is declared to be a leading purpose of the act. 'The provision in the third section, that no loan shall be for a less term than one year, and that no foreclosure shall be had under five years, are to carry out the same object. The preservation of the right of redemption after a sale to the corporation by the master, so long as it shall remain in their hands unsold, is still subservient to the same end—accommodation and indulgence to the borrower. These rights, thus guarded, cannot be destroyed or impaired, but by a most *rigid* and *unfavorable* construction of the provisions by which the right and property of mortgagors are meant to be protected against the encroachments of the company.

Again : whenever a *sale* is mentioned in the statutes of this state, the word is used in its technical sense, which is, "a transfer of title for valuable consideration." Thus, in 1 R. S. 397, § 63, 64, 65, a sale is directed of real estate for payment of taxes. In this statute, wherever the word occurs it is used to signify an *immediate transfer* of title to the purchaser. The sale is not, in any sense, an *executory agreement to sell*, but a conditional sale, which takes effect *in præsentî*. A parol sale, prescribed by statute, is as effectual as if made with the solemnities required by the statute of frauds and perjuries. The condition is annexed by statute, not by any executory agreement. It is, that the person whose estate is sold may *redeem* by payment within the specified period. The word *redeem*, as used in the statute, implies that the *title has passed* by the act of sale ; otherwise there would be nothing to *redeem*. This condition being prescribed in the statute, the transaction is the same, in substance and effect, as if a deed, thus conditional, were delivered at the same time. The delivery of a deed, on default of redemption, as prescribed in § 80, vests no new title, though called a conveyance ; but merely furnishes evidence that the title before transferred has become

Edwards v. Farmers' Fire Ins. & L. Co.

absolute. This is stated in § 96, in so many words. Speaking of this conveyance it says, "that whenever the comptroller shall discover, *prior* to the conveyance of any lands sold for taxes, that the SALE was, for any cause whatever, invalid and *ineffectual to GIVE TITLE to the lands sold*, he shall not convey the lands so improperly sold," &c. but shall cause the purchase money to be refunded. By this provision, if the *sale itself* has not *given title* "*prior* to the conveyance," the purchase money must *always* be refunded. The statute has, therefore, happily *defined* what it means by a *sale*, and in conformity with the general *legal definition*.

The fact that the purchaser has a conditional and not an absolute estate, or that he is not entitled to entry until a future day, does not make the *sale* an *executory* agreement. The purchaser buys the future interest, when the property is struck off on his bid. A present sale of a future interest transfers the title *in presenti*, and is as much an *act executed* as if the right of enjoyment were immediate. Thus the sale of a reversion, remainder or other *future* interest in real estate, gives *immediate title*, and is not in any sense executory.

In like manner the word *sale*, in the statute regarding sales by auctioneers, 1 R. S. 527, § 26, and elsewhere, is used in its legal and proper sense. The sale is made, and the title passes; but the contract on the *part of the purchaser* may not be immediately *executed*, (although not *executory*) by payment of the money. A tender of the money in time will entitle the purchaser to *trover*, if the goods are withheld. This is because the sale gave him an immediate title; for no other conveyance from the vendor is necessary to perfect it. So in the case of sales *on execution*, 2 R. S. 293, by the sale the *title is immediately transferred*. The officer selling, § 42, is to give a certificate "stating the time when *such sale will become absolute*, and the purchaser be entitled to a conveyance, pursuant to law." The purchaser is not entitled to a conveyance until *after the sale has become absolute*. The conveyance, therefore, as in the case already noticed of the sale of lands for taxes, is not to transfer a title, but merely to clothe with proper documentary evidence, a title previously

sold, subject to certain conditions, but which has, itself, *by the sale, become absolute, before* the conveyance is given. The power given the debtor, in section 45, &c., to *redeem*, could with no propriety be granted, unless the title *had passed by the sale*, subject to redemption. In section 61, the power given to confirm irregular sales made by order of a court of probate or surrogate, shows that the sales had transferred the title, and the confirmation obviated the irregularity, but gave no new title. The *conveyance* mentioned performed the same office as the case already explained. But in section 66, "*a contract for the purchase of land*" is mentioned as such, and as contradistinguished from a sale or purchase, which shows that the legislature were aware of the distinction, and used language accordingly. The same remarks will apply to the language used in the statutes of other states, whenever the import of the word *sale* is to be gathered from effects given to a sale by the enactment. In common parlance an agreement to sell, where the vendor is to do further acts in order to transfer the title, is never called a sale. Such use of the word would be especially improper and absurd, if applied to an executory agreement to *acquire the title* of another and transfer it to the promisee. In common parlance, no one would say that A. had sold to B. the land of C.; that the corporation *had sold* to the Merritts the title still in Tibbits. It must be *acquired* before it can be *sold*. Much less can this be admitted, where the statute is to be liberally and benignly construed in favor of the right which it gives to redeem. There are only two modes of construction—that given in civil, and that in criminal cases, and these are well defined. A law is construed benignly and liberally in favor of the accused. The rules are technical and well settled, and they exclude that interpretation of the third section of the charter which deprives the mortgagor of the right reserved to him, by reason of a contract to sell the title of another, on the ground that it was an *actual sale* within the meaning of the provision.

G. Wood, in reply. The only important question is whether after the contract with the *Merritts*, the property in ques-

Edwards v. Farmers' Fire Ins. & L. Co.

tion can be considered as *still remaining in the hands of the defendants unsold*. According to the popular sense of the terms used in the act, there is no room for doubt, and this statute should receive a construction according to such sense. Dwarrior on Statutes, 702. The statute does not require a *conveyance* to be executed; if a *bargain* be made which can be enforced within the statute of frauds, it is all that can be asked. A *conveyance* is not a *sale*; it is but the evidence of a sale. After the *statute of uses*, land was sold as an article of merchandize by deed of bargain and sale. 3 Cruise, 172. Bargain and Sale, tit. 32, ch. 11, § 1. Whenever the terms of the bargain are reduced to writing, the property is considered as sold. Our legislature in repeated instances, recognize a *sale* as made, although the *conveyance* is subsequently to be executed: 2 R. S. 48, § 61; 110, § 61; 293, § 42, 43, 45; 409, § 63, 64, 65; 1 R. S. 527, § 26, 532. So do the legislatures of New Jersey and Massachusetts, and the British Parliament, 17 Geo. III. ch. 8; 13 Price, 76, 104. A court of equity would deem the contract a sale and enforce it accordingly. Can it be doubted, that had the property been deteriorated intermediate the contract and a conveyance, that it would have been the loss of the purchasers, and not of the vendors. The learned counsel has alluded to a portion of the defendant's charter, in which it is said, that the act of incorporation shall be construed benignly and favorably, to effect the ends and purposes contemplated by the legislature. Be it so; and it is then asked, did the legislature contemplate that this corporation should in selling the property purchased in by them, dispose of it in a manner different from that usually adopted by owners of property in making disposition of the same. The former owner of the property could not in this way be deprived of his right to redeem, if the sale *was fraudulent*; but if *bona fide*, the property no longer remaining in the hands of the defendants *unsold*, the right of the party to redeem is gone; the mortgage having been foreclosed in equity and the *common law right* of redemption thus destroyed.

 Edwards v. Farmer's Fire Ins. & L. Co.

By the Court, COWEN, J. Mr. Maxwell's deposition was clearly admissible, as well to show that the company were properly made defendants, as for other purposes of the cause. It proved that the *defendants claimed title* to the premises in question. No doubt was raised that the president had power to speak in reply to the *tender*. The reason assigned by him for refusing to accept the money was, that the defendants had made a contract to sell. This implied a legal right in the company. It was in effect "claiming title or interest," within the terms of 2 R. S. 230, § 4, 2d ed. It is supposed, that in order to give efficacy to such claim, the plaintiff should have first shown that the premises were *unoccupied*. To this there are two answers: A claim is one material item of evidence to establish possession at the common law. *Non constat*, as yet, that the plaintiff might not proceed to show actual occupation by the defendants; in which case, it would be material to see by their declarations whether they were in as mere workmen, perhaps daily servants under another, or as claiming to own the premises. *Doe ex dem. Stansbury v. Arkwright*, 5 Carr. & Payne, 575. The same section, 4 of the statute, speaks of the exercise of acts of ownership, as of itself subjecting the party to an ejectment. Beside, if it were material to show that the premises were vacant, according to the order which seems to be contemplated by this section, the question was but upon the priority of evidence; and however the requisite preliminary fact might have been wanting at the stage when the objection was raised, it was supplied by the defendants themselves afterwards proving that such of the premises as the verdict finally covered, were in truth *vacant* at the time when the claim was interposed. It is well settled, that an objection, technically correct at the time, may be rendered pointless by testimony afterwards coming from the objector, or, in many cases, even from the party against whom the exception is taken. *Murray v. Judah*, 6 Cowen, 484, 490. *Norris v. Badger*, id. 449; 455. *Jackson, ex dem. Hille, v. Tuttle*, 7 id. 364, and the note to the latter case, p. 365. The judge was therefore right in refusing to nonsuit the plaintiff on the question of possession.

Edwards v. Farmers' Fire Ins. & L. Co.

Whether the case was afterwards varied in this respect by the contract with the Merritts, and their acts of ownership, is another question. I will only observe, for the present, that if the defendants were to be viewed previous to the tender, as I think we shall see they must be with regard to the plaintiff, in the light of legal owners, their interposing a claim of interest, *as owners*, qualified with the mere general declaration that they had contracted to convey to another, the premises being at the same time unoccupied, and it not appearing that the plaintiff was apprised of the circumstances afterwards given in evidence, which might have worked a change of possession as between the defendants and the Merritts, the judge was by no means wrong in finally charging the jury that the defendants were properly made parties. The circumstances of the premises being vacant, a claim of title or some interest would of themselves make the defendants proper parties. 2 R. S. 230, § 4, 2d ed. And after admitting themselves to be proper parties within the statute, the defendants shall not be heard to question the acts or declarations, which in all probability led to the service of the declaration upon them, without at least showing that they had before set the plaintiff right in all those particulars which might instruct him as to the propriety of pursuing other parties. *Hall v. White*, 3 Carr. & P. 136. I admit that the stipulation with the Merritts to give them possession, and their acts of ownership which followed, would have made them proper parties in ejectment at the suit of these defendants, and might have warranted the plaintiff's election to sue either. See *Cook v. Rider*, 16 Pick. 186, and *Cooper v. Smith*, 9 Serg. & Rawle, 26. A resort to the Merritts, however, was matter of election. It would not have concluded the defendants, the former legal proprietors, and still claiming to hold that position, unless the Merritts had compelled them by notice to assume their defence. The present action has the advantage of covering and contesting the whole interest in the land with persons who are in this respect, at least, more properly made parties. On the whole, therefore, I think there is no technical impediment to an examination of the legal title of these parties.

As between the plaintiff and the defendants, the latter clearly became the legal owners of the premises in question by the purchase of their agent, Tibbits, at the master's sale, although he took the conveyance in his own name. However that might, as it did, with the circumstance of Tibbits' death, produce delay and embarrassment in conveying to the company's vendees, the company can never cut off the right of their mortgagors to redeem within the terms of this charter, by putting forward their agent as the nominal purchaser. To allow such a consequence, would place it in their power to defeat at their pleasure the purposes of a very material enactment. No one of the parties concerned ever thought that Tibbits acquired any real interest even in respect to the company, which is taking the strongest view. The latter having consented to his name being put into the deed as grantee, must abide the effect of its working a technically legal estate in their trustee thus chosen. But it does not look well to make a point that they could by such a manoeuvre deprive the plaintiff of his chartered and stipulated right to redeem; at all events, it would be to fix an extremely bad construction on a statute, were we to say that the party against whom it was intended to operate might evade and defraud it by the adoption of a mere formula.

Then what were the plaintiff's rights as declared by this charter? I answer, that he had a legal statute right to redeem, so long as the property remained in the defendant's hands unsold; and this notwithstanding the decree of foreclosure. I will put it that the defendants had made a legal and valid stipulation in their mortgage that the plaintiff might so redeem; for the charter shall be read as a part of their mortgage. What would have been the consequence of actual redemption by payment? The counsel for the defendants concede that it would nullify a mortgage in all cases, and both the mortgage and decree in this case, thus revesting the legal title in the mortgagor. And see 1 Powell on Mortgages, 109 to 110, Rand's ed. 1828, and the notes there.

But it is strenuously insisted that a tender and refusal shall not ever touch the lien; and this is put, first, upon the general

Edwards v. Farmers' Fire Ins. & L. Co.

law in respect to redemption, which I hardly think should be allowed to affect the case at bar. But suppose it to bear upon the question, what is the effect of a tender and refusal under that law? This is said to depend on the time when the tender is made. If at the precise day expressed in the mortgage for payment, it is agreed that the lien is thus removed, and that the mortgagor may oust the mortgagee by ejectment, if he be in possession. Co. Litt. 205, a. 1 Powell on Mortgages, Rand's ed. 1828, p. 5, 6. But it is added that a tender after the day has no effect, either at law or in equity, unless it be to save the costs of the latter court when the mortgagor comes with his redemption bill. The argument insists that against the tender we should set up the ancient rigor of the law, by confining it to the day stipulated; that for this purpose, the estate has become absolute; and many cases are cited to show that the ancient strictness has not been relaxed as between the mortgagor and mortgagee, or those standing in their place. That the mortgagee is still, independent of our present statute, 2 R. S. 236, § 57, 2d ed. to be considered the absolute owner at law after default of payment, may be admitted. *Jackson, ex dem. Minkler, v. Minkler*, 10 Johns. R. 480. *Jackson, ex dem. The People, v. Pierce*, id. 414. *Smith v. Shuler*, 12 Serg. & Rawle, 240. *Simpson's lessee v. Ammons*, 1 Binney, 175. But why is that so? It is but to afford an additional remedy for non-payment of the money. Per Woodworth, J., 18 Johns. R. 114. This is in furtherance of the primary object. It enables the mortgagee, by a short process of law, to take into his own hand, and withhold the security from the waste of a desperate mortgagor. It is a measure of safety which can many times be compassed in no other way; certainly not by the dilatory and expensive course of a bill and injunction in equity, to which, with us, a mortgagee out of possession is now confined. By the statute, 7 Geo. 2, ch. 20, a court of law might discharge an ejectment brought by the mortgagee, on the money due being brought into court; and in one of the first cases moved under this act, Anon., 1 Strange, 413, Denton of counsel, who made the motion, said that the same thing was done often in the common

 Edwards v. Farmers' Fire Ins. & I. Co.

pleas. The motion was made at Hillary term, 7 Geo. 2; and the practice referred to had probably prevailed even before the passing of the act. Indeed that this is so, and that the strict right is maintained by a mere fiction, to coerce payment, would seem to be implied from the well settled notion that a release or payment of the money saves the estate, and bars an action of ejectment as well as debt on the collateral bond. *Richards v. Syms*, Barnardist. Ch. Rep. 90. Per Platt, J. in *Jackson, ex dem. Randall, v. Davis*, 18 Johns. R. 7, 12. *Runyan v. Mersereau*, 11 id. 534. *Jackson, ex dem. Bowers, v. Crafts*, 18 id. 110. *Green v. Hart*, 1 id. 590, per Spencer, J. *Jackson, ex dem. Norton, v. Willard*, 4 id. 42, 43, per Kent, Ch. J. *Peltz v. Clarke*, 5 Peters, 481, 483, and see *Jackson, ex dem. Ireland, v. Hull*, 10 Johns. R. 481. Incident to the remedy for enforcing payment, the mortgagee shall be so deemed to have the fee, as to avoid junior incumbrances and transfers made by the mortgagor, whether conventional or by operation of law, as well as for the purpose of a conventional foreclosure by a release to him of the equity of redemption. The latter has been held to operate by way of merging the mortgagor's equity in the mortgagee's legal estate, so as to cut off, or at least qualify a right of dower in the former. *Van Dyne v. Thayer*, 19 Wendell, 162, and the cases there cited.

"That the mortgagee shall be deemed owner for any other purpose, could not be said in this state, at least after the case of *Runyan v. Mersereau*, which held that trespass lay by the mortgagor against the mortgagee, for an entry and cutting timber upon the mortgaged premises, though after default of payment. It is not necessary to go into the cases which consider the relation of the mortgagor to others. It is presented in its various aspects by the cases cited and remarks of the counsel and court in *Runyan v. Mersereau*, and again by Savage, Ch. J. in *Astor v. Hoyt*, 5 Wendell, 615, 616. See also *Wilson v. Troup*, 2 Cowen, 230, 231, per Sutherland, J. and the cases there cited by him. Beside, if the mortgagee is the owner, how can the payment or forgiving of the debt, transfer the freehold from him to the mortgagor? Kent, Ch. J. in *Waters v. Stewart*,

Edwards v. Farmers' Fire Ins. & L. Co.

1 Caines' Cas. in Er. 69; and cases before cited. That was the difficulty in *Richardson v. Syms*, where the debt was forgiven. It is supposed that what Lord Hardwicke said in that case, of the rule *at law*, related to a payment at the day. But it was not pretended on the argument here, that the doctrine now stands narrowed to that; and yet if the estate be absolute in the mortgagee, how can payment defeat the title? It cannot operate as a conveyance, even though the parties should agree expressly, that what is now loudly called the legal estate, should pass. If the mortgagee's right be an estate in land, the statute of frauds says it shall not pass without writing. Here must then be something else than a transfer of the legal fee. What is it? Lord Hardwicke answers in *Barnardiston*, 93. He says, the right of the mortgagee is not to be considered an estate in land. His words are: "Where a mortgage is made of an estate, that is only considered as a security for money due. The land is the accident attending upon the other; and when the debt is discharged, the interest in the land follows of course. *In law, the interest in the land is thereby defeated*, and in equity a trust arises for the benefit of the mortgagor. In ejectment, where the title is made under a mortgage, if evidence is given that the debt is satisfied, this is considered as defeating the estate in the land which the mortgagee had;" and, (he adds,) "especially where the mortgage is ancient, the court will presume that the money was paid at the day." He does not say that if it appear to be paid afterwards in fact, this would differ the result; but only puts presumption of payment at the day as an emphatic case, a mode of defeating the title, even within the most strict notion of the law. He proceeds: "No writing is *in these cases* necessary, which shows that *even the law considers the debt as the principal, and the land to be only an accident.*" The payment, then according to Lord Hardwicke, operates by way of defeasance; and that, too, a payment after the law day; not because, as was supposed at the bar, the parties come together and agree that it shall have that effect for the sake of divesting the supposed legal fee. That would be evading the statute of frauds. It

would be conveying an estate in fee under another name agreed by the parties. A. cannot by parol sell his farm to B., by the manoeuvre of declaring that his title is subject to a defeasance, even though B. should agree to it. 'No. The title to real property cannot be divested by a mere payment of money, except where the law itself has first raised the right of defeasance. It does so, according to all the modern cases. It overrides the exact law day, and gives the mortgagor the same right to pay at any time after, until foreclosure, as he had at the day, subject to the addition of costs, if an ejectment or a suit in equity be brought before the payment. It must be admitted that, by this doctrine, nearly all the essential characteristics of the ancient mortgage are subverted; that it indeed ceases to be a mortgage, except for the purposes we have mentioned; and now, since the revised statutes, even ejectment is denied. The mortgagee can only retain actual possession till payment, per Savage, Ch. J. in *Jackson, ex dem Titus, v. Myers*, 11 Wendell, 538, *Van Dyne v. Thayer*, 14 id. 233, provided he has been voluntarily let into possession. *Van Dyne v. Thayer*, 19 Wendell, 162, and the cases there cited. It has ceased to be the *vadium mortuum*, dead pledge or mortgage. Decisions at law as well as in equity, have long viewed it in the light of a mere pledge of property, redeemable at any time previous to a judicial foreclosure. They have proceeded in the spirit of the civil law, which disabled the borrower to contract for the absolute forfeiture of the property pledged, on condition that the money should not be paid at the day, for fear that cruel creditors should take advantage of the necessity of poor debtors. Wood's Civil Law, 184. Browne's Civil Law, 203. The law day is postponed. The clause which fixes it is, in effect, stricken out of the mortgage. The cases in respect to mortgages of personal property were cited to us; *Brown v. Bement*, 8 Johns. R. 96; *Ackley v. Finch*, 7 Cowen, 290; *Langdon v. Buel*, 9 Wendell, 80; *Ferguson v. Lee*, id. 258; *Patchen v. Pierce*, 12 Wendell, 61; but they lie under a different rule. I have been unable in going over the cases to avoid the conclusion, *a priori*, that the mortgagor of the real property

Edwards v. Farmers' Fire Ins. & L. Co.

has the same right to pay after, as at the law day, subject to the qualifications I have mentioned. He may, therefore, tender the money; and I cannot see why this shall not be followed by the same consequence as if it had been tendered at the express day, viz. the saving of the estate. "In all cases," says Lord Coke, "of a condition for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards." Co. Litt. 208. Litt. § 338. Coke adds, p. 209, b. "If A. (the mortgagor) tender the money to B., (the mortgagee,) and he refuseth it, A. may enter into the land, and the land is freed forever of the condition; but yet the debt remaineth; and may be recovered by action of debt." That the right of tender and the same consequence of refusal, extend beyond the law day, was expressly held by this court in *Jackson, ex dem. Bowers, v. Crafts*, 18 Johns. R. 110. Such a tender and refusal, were there received as so far equivalent to payment, that they raised the lien, and barred an ejectment. This decision has several times since been recognized as law, at least by Chief Justice Savage. *Aster v. Hoyt*, 5 Wendell, 617. *Jackson, ex dem. Titus, v. Myers*, 11 id. 538. The reason is the same, whether the tender be made at or after the day. It is in both cases, equally the folly of the mortgagee to refuse. See 18 Johns. R. 115, and books there cited.

I certainly might have contented myself with merely citing *Jackson v. Crafts*, as forming the law of this court, had not that decision been questioned by the present chancellor in the late case of *Merritts v. Lambert*, M. S. which was that of a bill drawing this very title in question. The chancellor held that the tender by the present plaintiff did not divest the legal right of the company. He may indeed be correct in his remark, that the books cited by Mr. Justice Woodworth, who delivered the opinion in *Jackson v. Crafts*, would not of themselves warrant the conclusion to which that case came. They relate to raising the lien by a tender *at the day*, taking for granted what, with reference to the learned chancellor, I think must follow from the

almost unbroken current of modern cases, especially in this state, that the law day is not now what it formerly was, but is extended to all time intermediate the date of the mortgage and foreclosure. He adds that even actual payment after the law day would not relieve the estate at common law, though he admits it will do so now. He does not enter into the reason for the distinction, and I have sought in vain for any, except that the law day is adjourned; thus letting in the same force of the tender upon the adjourned day, which formerly could bear only on the point of time stipulated by the parties. If the injunction *stare decisis* be allowed in its proper force, it appears to me that after the course this court had taken in regard to mortgages terminating in *Runyan v. Mersereau*, it was fully authorized, not to say bound, in *Jackson v. Crafts*, to assume that the law day stood open until foreclosure. To have labored the point might have implied weakness in an important practical position, which the legal school in which Mr. Justice Woodworth had been bred, very justly deemed it unsafe to concede. It could not have been originally wrong, if it be right to say that the mortgagee shall be content with his money. But if, otherwise, the wrong would be much greater were it to be overthrown after standing for more than twenty years, and entering as an acknowledged element into the mortgage transactions of a great commercial state. Ram on Legal Judgment, 4, 5.

Tribunals of other states, we are admonished, hold a distinction between the effect of tender and payment *after the day*. *Hill v. Payson*, 3 Mass. R. 559. *Maynard v. Hunt*, 5 Pick. 243. Were this so, even upon good reason, the foreign law of mortgages ought cautiously to be received against what has, I think, reached the rank of a postulate in our own jurisprudence. But the point did not arise in *Hill v. Payson*; and the *obiter dictum* relied on is very latitudinarian. The court said that a tender would not entitle to an ejectment, without distinguishing between a tender at the day or after. *Maynard v. Hunt* is indeed to the point, but founded on a course of reasoning which I think we have seen cannot be sustained. The case says

Edwards v. Farmers' Fire Ins. & L. Co.

that passing the law day vested a legal title in the mortgagee; and yet suggests that payment would divest it, because by accepting the money the debt is discharged, and the mortgagee waives the condition. Clearly, if there was an estate in fee, it could not thus be divested by parol. Calling it payment and waiver does not change the nature of the act, which, without writing, is made to transfer an inheritable freehold, contrary to the statute of frauds. Then the consequence of a tender is said to be different because the debt is not discharged. The reason is clearly too broad. The debt is not discharged even by a tender at the day; yet the lien on the land was extinguished as long ago as Littleton's day, Co. Litt. 209, a. b. § 338, of Litt. & Coke's Commentary; leaving the debt due and recoverable by action against the mortgagor. If, in Massachusetts, the law day be not postponed, as it would seem from their cases, then indeed neither payment nor tender afterwards could avail any thing. In a former case in the same court, Wilde, J. said the mortgagee's estate and right to possession continues until the full and complete performance of the condition or a tender equivalent thereto; thus at least admitting the doctrine cited from Co. Litt. to which he refers. The short reason of the Massachusetts cases is, however, I apprehend, that they have declined to consider the mortgage a chattel interest, and in that have come short of us. There a mortgage cannot be assigned without deed. Mellen, Ch. J., reviews all their cases decided down to 1823, and says expressly they have come short of the New York cases. *Vose v. Handy*, 2 Greenl. 333. That case holds, also, that at law it can be assigned only by deed in the state of Maine. It were more consistent in Massachusetts, to maintain with the late Judge Trowbridge of that state, that even payment after the day will not divest the legal fee of the mortgagee. See his opinion, as stated by Story, J., in *Gray v. Jenks*, 3 Mason, 523. Indeed, such I take to be the plain amount of *Parsons v. Wells*, 17 Mass. R. 419. The theory, then, of Massachusetts and New York is diametrically opposite. There the mortgagee has a freehold, which passes only by deed. Here he has but a chattel interest, defeasible by payment; and which interest is indeed

Edwards v. Farmers' Fire Ins. & L. Co.

so clear of the statute of frauds, that a deed expressly granting all the mortgagee's estate in the land will not carry the interest in the mortgage. This was held in *Jackson ex dem. Curtis v. Bronson*, 19 Johns. R. 325. Why will it not touch that interest? The court answer, "the mortgagee has a mere chattel interest, and the mortgagor is considered the proprietor of the freehold." A deed of land will not of course carry a chattel. This decision was in the spirit of *Martin ex dem. Weston v. Mowlin*, decided by the king's bench, Lord Mansfield being at their head, 2 Burr. 969, 978, 979, which held that a devise of land would not carry a mortgage interest, though a bequest of the money would. We thus come back to the notion of a chattel pledge redeemable at any time. Lord Mansfield said the estate in the land is the same thing as the money due upon it, and will pass by a will not executed according to the statute of frauds. Wilde, J. repudiates this doctrine in *Parsons v. Welles*, alleging that Lord Mansfield cited no authority, and his remarks seemed difficult to reconcile with established principles or the statute of frauds. In this state we have always acted fully up to Lord Mansfield's doctrines, and carried them out in all their consequences. It was again under this view that we were pressed with cases decided in respect to mortgages of personal property, where default at the day carries an absolute title for every purpose, at least in a court of law. These cases have been before cited, and among them *Patchin v. Pierce*, wherein several things are pointed out showing that the law has raised, in regard to chattel mortgages, a different system, which, for many years, no one has thought of applying to mortgages of real property. Upon chattels, the courts of law, however it may be in equity, have let in the hated *pactum commissorium*, or dead pledge of the civil law; though Mr. Justice Nelson thought that its character might be softened in chancery. *Patchin v. Pierce*, 12 Wendell, 62, 63.

But whatever be the law of mortgages in general, how stand these defendants when placed upon the footing of their charter? It will be perceived I am all along supposing that they were, at the time of the tender, still the holders of the

Edwards v. Farmers' Fire Ins. & L. Co.

premises in question under the purchase of their agent Tibbits; a question to be examined by and by. The third section declares that, so long as they thus hold, notwithstanding a decree of foreclosure, *the mortgagor shall have the right of redemption*. The argument of the defendants is, "True, you have a *right to redeem*; but that must depend on our willingness to receive the money. Till that time the lien continues." It seems to me that the statement of such an argument would carry its own refutation, even under the rigorous doctrines of Coke. A right created by statute adverse to the mortgagee, and yet no remedy at law, is as if statute and law were not identical! A right to redeem, but none to tender the money! A statute fixing the law day, and yet a tender at that day shall not take away the lien! Suppose the defendants had stipulated in terms, under a statute authorizing it, that their debtor might redeem at any time before they had sold; that is this case, and the argument need not be pursued. It were indeed a singular law which should declare the right of payment in the debtor, but withhold the effect of a tender. A statute lacks one essential attribute of a municipal law, when neither by its own provisions, nor the system under which it is enacted, any method is pointed out for redressing the wrongs which arise from its infraction.

Lastly, did the premises in question at the time of the tender remain in the hands of the defendants unsold? No point is now made that Mr. Tallmadge was not authorized to affix the corporate seal of the company to the *contract with the Merritts*; though it is still insisted that it wanted mutuality, inasmuch as no authority was shown in Wm. T. to execute for Isaac Merritt. But it is now settled that the company would be bound by this contract though executed only by themselves. 2 R. S. 69, § 8, 2d ed. *McCrea v. Purmort*, 16 Wendell, 465, and the cases there cited. Formal difficulties being out of the way, shall this contract be deemed a sale of the land within the charter? The Merritts took a contract from the company to convey within a reasonable time after they should become vested with the title. This qualification, doubtless, had reference to the

Edwards v. Farmer's Fire Ins. & L. Co.

embarrassed state of the title as between them and Tibbits, who as their agent, and it must be taken by their consent, purchased and took a deed in his own name. We have already noticed the impropriety of allowing such a condition of things to impede the plaintiff's course in making his tender; while it had a very different consequence in respect to the defendants. It at least put them to pursue an equitable litigation. Having no title, they were very properly guarded in their contract with the Merritts. They would not convey, nor agree to convey absolutely; but only on condition that they could obtain the *title*; and they now say that this agreement was an actual sale of the lands. This they must make out in order to cut off the plaintiff's right to recover.

That here was a strict sale, cannot be pretended, within either the legal or common definition of the term. It was a contract to *sell at another day*, on conditions yet to be performed. It is claimed to derive its operation, and we have just seen does operate under the 8th section of the statute of frauds, which relates to contracts respecting real estate. That section, I think, itself draws the distinction, as I believe it will be found to exist in all those cases where it is sought to be announced by a legal accuracy of expression. The words are, "*every contract for the sale of any lands, &c.*" shall be void unless in writing, subscribed by the party "*by whom the sale is to be made.*" In short, this contract with the Merritts was for *a sale to be made*; and that sale was to be made after the company had acquired title. Again, *Bull v. Price*, 5 Moore, & Payne, 2, maintains the same distinction. The defendant had retained the plaintiff to negotiate *a sale* of his land; and agreed to give him two pounds *per cent.* on the sum he obtained. A sale was negotiated, and the money ready to be paid; but a delay arose in consequence of the vendee requiring that an incumbrancer should join in a conveyance. In an action for the two per cent. Tindal, Ch. J. nonsuited the plaintiff. He said he thought the word "*sale*" must be construed strictly; a sale consummated and conveyance executed. On motion at the bar, the nonsuit was sustained. It is proper to

 Edwards v. Farmers' Fire Ins. & L. Co.

observe that considerable stress was, at the bar, laid upon the phrase "on the sum to be obtained," as implying that the money must be actually paid, or at least tendered to and refused by the plaintiff. But the case furnishes Lord Chief Justice Tindal's definition of a sale when taken according to its strict meaning. It is sometimes used to denote the striking down of land at auction, though the time for executing a deed may be suspended, as in case of sheriffs' sales of land subject to redemption, a sale of land under a power contained in a mortgage, or by the comptroller for taxes. These, and I don't know but some other like cases, were mentioned in argument; but would hardly furnish out a meaning for private transactions in real estate. Johnson, in his dictionary, gives as a secondary meaning of the word, "a public and proclaimed exposition of goods to the market; *auktion*." The operative words in a deed of bargain and sale, such as would have satisfied the covenant in question, and which is our ordinary method of passing title, are—have granted, bargained, *sold*, &c. and by these presents do grant, bargain, *sell*, &c. 3 Wood's Conv. 42. Long says, a sale is a *transferring of property* from one person to another. He says it is founded on a valuable consideration, by which the party who *disposes* of his *lands or goods* is induced, &c. Long on Sales, 1. In short, a sale passes the property, and is called a contract executed; it operates *in rem*, conferring a right to take possession or bring ejectment or trover. A contract to sell, such as the one before us, is executory, and operates *in personam* only. Though one has agreed to sell his farm unconditionally, it must still in legal propriety be considered as unsold. The agreement creates but *jus ad rem*; a sale, to be complete, must carry the *jus in re*. The former is a step towards the act of sale; the latter is the act itself. Here the *jus in re* all along continued in the company. The Merritts might refuse to accept the deed of sale; and the chancellor in his discretion might have refused to decree a sale, on the ground that a cloud rested on the company's title.

Something, too, upon this point, it appears to me, may be collected from the context of the section which confers the

 Edwards v. Farmers' Fire Ins. & L. Co.

right of redemption. This declares that the company *shall sell and dispose* of land purchased by them within five years after it acquires the same; and shall not be capable of *holding the same* after that time. If they do so hold, the land shall become forfeited to the government. Can there be a doubt that these phrases contemplate complete acts of acquisition, disposition and forfeiture? They relate to the whole estate, legal and equitable. Can it be that the act of parting with but a portion of the estate will satisfy this provision? The Merritts, admitting them to have taken possession and enclosed the land, acquired but an estate at will. The company were their landlords, holding the fee, and at least, on the Merritts' refusing to perform by accepting a deed of bargain and sale and executing a mortgage security, might turn them out of possession by an ejectment. Is this the kind of disposition which shall work the consequences of cutting off the right of redemption, and avoiding forfeiture? When shall the company be said to *acquire* the property in land? When the deed of conveyance is delivered. When do they *cease to hold by selling and disposing*? When they have delivered the deed of conveyance. If they may hold on to a small part of the estate, they may also to a larger. The construction contended for by the company would enable them to evade both redemption and forfeiture, still retaining *unsold*, the substantial interest in the land.

Is it then permissible to leave the primary, legal and most common meaning of the word *sale*, and resort to secondary, accidental or constructive meaning? I am aware that we are here again brought to encounter the opinion of the learned chancellor in *Merritts v. Lambert*. He thinks, that after the creation of a right to a future specific performance, the property is no longer to be considered unsold. If this be so, it must depend on the rule peculiar to his court, that what ought to be done shall be taken as done. I admit this is a rule very healthful in overreaching those who buy, or come in under the covenantor, with notice. But it is after all no more than a fiction, and should never be strained to the working of injustice. The utmost amount of the argument is, that the word *sale* has in chancery a

 Edwards v. Farmers' Fire Ins. & L. Co.

constructive meaning, comprehending a class of contracts not known to the law ; that, for certain purposes, it considers a contract executed which is not so, and we are required to construe a word used by a statute in the same broad sense ; in short, to adopt the *equitable*, not the *legal* meaning of the word. Aside from objections arising *a priori* to such a test of statute meaning, I think it will be found that all the cases, so far as they have spoken, are against it. I will mention one which seems to be in point. The statute, 1 R. L. of 1813, p. 74, § 4, provided that where A. was seised or possessed of land in trust for B., the land might be sold on execution against B. ; and Chancellor Kent held that the statute did not extend to such constructive trust as a court of equity raises in favor of a covenantee under a contract to sell. His words are, that to warrant an execution against such land, "there must be either a real estate, or an interest known or recognized *at law*." *Bogert v. Perry*, 1 Johns. Ch. R. 52, 56. Yet, in equity, here was a seisin in trust for the execution debtor. "Equity," says Sugden, "looks upon things agreed to be done, as actually performed ; consequently, when a contract is made for the sale of an estate equity considers the vendor as a trustee for the purchaser." Sugden on Vend. 211, Brookfield ed. 1836. It is remarkable, that here again we have the real nature of the contract in question stated, "a contract for the sale of an estate" [at law], which equity, by a process of reasoning, extremely artificial, considers actually consummated—a *sale made*. Is it safe to say the legislature meant the latter ? If asked, would they say so ? It would be hazarding little to answer that nine tenths of the legislature had never heard of the distinction. But if the distinction were to avail, how far shall it be carried ? *In fictione juris semper æquitas existit*. The title of the plaintiff was paramount to that of the Merritts. They could not enforce their contract against the defendants, till the latter had acquired the legal title. Before they did so as between them and the heirs of Tibbitts, the tender was made. They had clearly no right to file their bill against the company at the time of the tender ; and even when the proper time

Edwards v. Farmers' Fire Ins. & L. Co.

arrived, what would the chancellor decree? Not that they *had sold*, but that they *should sell* by a deed of *bargain and sale*, to be approved by the master. The very reason of coming to chancery is, that the covenantor refuses to sell according to his contract. If he is there found to have already sold to the complainant, the bill will be dismissed. We are called on to apply the doctrine of fictitious relation, which is never received to overreach intervening rights. At any rate, shall we carry it so far as to say that a covenant by A. *to sell* B.'s farm when A. gets a title, shall be considered *a sale*? I cannot see, however, that we are at all called on for secondary, remote or constructive meanings. I am sure the legislature could not have understood itself as sweeping over the whole field of executory and executed contracts, especially when providing indulgences to avoid the forfeiture of the mortgagor's property, and declaring, as they have, that the act shall be construed benignly and favorably to effect its ends and purposes. Would not such a construction rather operate as a snare to mortgagors? If there be a doubt on the question, I think it should be turned against the forfeiture of estates—against the encroachments of mortgagees. I wish not to be understood as speaking censoriously; but such, I think, has been the spirit of our adjudications—such was that of the Roman law.

It would be arrogant to say, after the decision of his honor the chancellor, that I feel no doubt on any of the points raised in this cause. I will say, however, that aside from his decision, I have found no serious difficulty in concluding that the verdict at the circuit must be sustained.

The CHIEF JUSTICE concurred in this conclusion.

Mr. Justice BRONSON dissented.

New trial denied.

END OF THE JULY TERM.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,

IN OCTOBER TERM, 1839, IN THE SIXTY-FIFTH YEAR OF THE INDEPENDENCE OF THE
UNITED STATES.

BANK OF SALINA *vs.* BABCOCK and others.

Where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder, and charges over against him and *cancels* other notes upon which are responsible parties but which are over-due and lie under protest, such *cancellation* is equivalent to *paying value at the time*, and precludes all defence existing as between the original parties.

THIS was an action of *assumpsit*, tried at the Onondaga circuit in April, 1838, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The suit was brought against the maker and endorsers of a promissory note for \$1500, at ninety days, dated 7th March, 1837, drawn by H. S. Gilbert, payable to L. Babcock, and endorsed by the latter and two mercantile firms, viz. *Trowbridge & Grant* and *J. & H. Paddock*. The note was discounted by the bank of Salina, on the 15th March, 1837, and the proceeds placed to the credit of *Trowbridge & Grant*, on the books of the bank, with whom that firm had extensive dealings. On the next day three notes drawn

Bank of Salina v. Babcock.

by Trowbridge & Grant, amounting together to upwards of \$2000, which were over-due and laid in the bank under protest, were charged to the account of Trowbridge & Grant and the notes cancelled ; upon two of which, amounting to \$1420, there was a responsible endorser. It was proved that the course of business at the Bank of Salina with such of their customers as had large dealings with the bank and resided at a distance, as was the case with Trowbridge & Grant, was to discount notes from time to time as they were received and to credit the proceeds on the books, and whenever a credit stood upon the books sufficient to pay such notes as had come to maturity, to charge the notes, cancel them and send them home. On the part of the maker and payee of the note it was proved, that there had been a misappropriation of the note ; that it had been made and intended by them that it should have been discounted *for the benefit of the payee* ; and they insisted that the Bank of Salina, not having made any advances upon or given any actual value for the note, but having received it and appropriated it to the payment of antecedent debts, were not entitled to recover against the maker and payee. The judge among other things charged the jury, that the acceptance of the note in question by the plaintiffs would not discharge the parties to the previous notes from their liability, and the jury accordingly found a verdict for the defendants. The plaintiffs ask for a new trial.

J. A. Spencer, for the plaintiffs.

W. Duer, for the defendants.

By the Court, NELSON, Ch. J. There is no question in the case but that the plaintiffs received and discounted the note in good faith, and the only pretence of objection to the recovery was, that no value had been given, and hence the defendant Babcock should be at liberty to set up the diversion of the paper. This seems to have been the view of the learned judge at the circuit, though the charge is somewhat obscure. The answer to the objection, however, is,

Bank of Salina v. Babcock.

that the proceeds of the note were placed to the credit of Trowbridge & Grant, for whom it was discounted; and were drawn out—not, I admit, by checking for the money, but by the *cancellation of securities* held by the plaintiffs, which was the same thing, in legal effect.

The court ought not to speculate about the probability of reviving these cancelled securities, in case the paper upon the strength of which they were cancelled should turn out to be unavailable; much less ought we to go into a calculation of the chances of revival as the ground of defeating the substituted security. It is enough that the plaintiffs, in good faith, charged over and *cancelled* them according to usage, and held them merely to be sent home. This is parting with value in the strictest sense of the term. The plaintiffs had a right to give up the old securities upon the faith of the new paper, and they have done an act that is equivalent, and so intended. What if the old debt might still remain which seems to have been the idea of the judge at the circuit? The securities which were held beyond the responsibility of the debtor himself were destroyed. Regarding the usage of the bank in keeping its accounts with its customers, as detailed by the cashier, we may safely say, that any alteration of the state of them to the prejudice of the institution, by reason of the discount of new paper should be deemed a parting with value therefor, within the meaning of the rule of law. It was urged on the argument, that there was no evidence that these securities were cancelled in consequence of the receipt of the note in question; but this is most obvious, as well from the course of dealing as the testimony of the cashier.

New trial granted.

 Griffith v. Reed.

 GRIFFITH and others *vs.* REED & DIXSON.

A bill of exchange imports that a debt is due from the drawee to the drawer, which is assigned to the payee of the bill; and if the drawee accepts it, is an acknowledgment on his part that *he has funds of the drawer* in his hands to the amount of the bill. When the bill is paid and taken up by the drawee, it ceases to be obligatory upon any of the parties.

The presumption that the drawer has funds in the hands of the drawee, may be rebutted; the drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor, who, on this implied obligation may have an action against the drawer—but not on the bill itself.

Where a bill is drawn by one person upon another, and a third party subscribes his name under that of the drawer, adding the word *surety* to his signature, the undertaking of such third party is with the payee or subsequent holder, that the bill shall be accepted and paid; but he incurs no obligation whatever, either express or implied, to the drawees.

MOTION to set aside report of referees. The declaration contained the common money counts. The suit was commenced by declaration, which was served on the defendant, *Reed*, only. The plaintiffs are commission merchants in the city of New York. The defendant, *Dixson*, in the fall of 1835 and the year following, resided at Richmond, Ontario county, and was largely engaged in manufacturing flour, which was sent to, and sold by the plaintiffs, in New York. From time to time *Dixson* drew bills on the plaintiffs to a large amount, which the plaintiffs, as they alleged, paid and took up, without having funds belonging to *Dixson* in their hands. On several of the bills *Reed* was a joint drawer with *Dixson*, as *his surety*. There were other bills drawn by *Dixson*, with other individuals as *his sureties*, against whom also actions were brought. In this case, the plaintiffs gave in evidence two bills, both substantially alike, though of different dates, one of which was as follows: "W. Richmond, 25th April, 1836. \$2000. Three months after date, please to pay to the order of H. K. Sanger, Esq. cashier, two thousand dollars, for value rec'd, and charge to ac. of your ob't serv't. (Signed) John Dixson. John F. Reed, *surety*. To Messrs. E. & J. Griffith & Co. Com. Mer-

Griffith v. Reed.

chants, New York." *Sanger*, the payee of the bills, was the cashier of the Utica Branch Bank, at Canandaigua. The drafts, on the day they respectively bear date, were discounted by the Branch Bank, for the account of Dixon, and the proceeds paid to him.

As the drafts were from time to time paid, the plaintiffs charged them in their books to *Dixon*. On the part of the defendant, *Reed*, it was insisted that the proceeds of 3224 barrels of flour, amounting to \$21,388 16, which the plaintiffs had received and sold, were applicable to the payment of these drafts. This would satisfy all the drafts signed by the sureties of Dixon. The plaintiffs insisted that the proceeds of the flour in question belonged to, and had been paid over to the house of *H. & D. Griffith & Co.* of Rochester. On this and other controverted questions of fact, it is unnecessary to set forth the evidence. If the facts were as the plaintiffs alleged, the defendant, *Reed*, still insisted that, having signed as a *surety* for Dixon, he was not liable in *this action*. The referees thought otherwise, and reported in favor of the plaintiffs.

A. *Worden*, for defendant.

O. *Hastings & M. T. Reynolds*, for plaintiffs.

By the Court, BRONSON, J. If we assume that the plaintiffs are right on all the controverted questions of fact in the case, they must still fail in their action. If they were in truth accommodation acceptors and had no funds applicable to the payment of these bills, their remedy is against Dixon, the *principal*, for whose accommodation they accepted; and not against *Reed* the *surety*.

As an original question, it would, perhaps, be well that a man should never be allowed to become a party to commercial paper as a *surety*—or rather, that his character of surety should be wholly disregarded. But it is quite too late to agitate that question in this state. It has been long settled that a man may become a party to a promissory note or bill of exchange as a surety, and that he is entitled to all the privileges applicable to that character, as fully as though he

Griffith v. Reed.

were surety in a different form of contract. *Pain v. Packard*, 13 Johns. R. 174. *King v. Baldwin*, 17 id. 384. *Manchester Iron Co. v. Sweeting*, 10 Wendell, 162. *Huffman v. Hulbert*, 13 id. 375. *Harris v. Warner*, id. 401. These remarks do not apply to an endorser; for though he is in the nature of a surety, he is not for all purposes entitled to that character. *Trimble v. Thorn*, 16 Johns. R. 152. *Beardsley v. Warner*, 6 Wendell, 610. S. C. in error, 8 id. 194. When it does not appear on the face of the paper that the party is a surety, notice of the character in which he contracted must of course be brought home to the holder before he can be affected by it. In this case the character in which Reed contracted appeared on the face of the bill, and every one into whose hands it came was bound to know that Dixson was the principal, and Reed his surety.

Although the relation of principal and surety between the joint drawers could not affect the ordinary rights and remedies of the holder, yet, under certain circumstances, the surety might be discharged, although the principal should remain liable. If, for example, the bill had been protested for non-payment, the holder could not safely treat with Dixson in any way which should prejudice Reed; and if the holder, after a request to enforce his remedy against the principal while he was able to pay, should neglect to do so until he became insolvent, the surety would be discharged. This doctrine will be found in the cases already cited.

To understand the effect which the relation of principal and surety between the drawers will have upon the acceptors, it will be proper to consider very briefly the nature and office of a bill of exchange.

A bill of exchange imports that a debt is due from the drawee to the drawer, which is assigned to the payee of the bill; and if the drawee accepts, it is an acknowledgment on his part that he has funds of the drawer in his hands to the amount of the bill. The presumption of funds in the hands of the acceptor is conclusive as between him and every *bona fide* holder of the paper; and it is so strong in favor of the

Griffith v. Reed.

drawer, that when the bill is payable to his own order, he may, like any other holder, maintain an action on the bill against the acceptor. The undertaking of the drawer is, that the bill shall be accepted and paid by the drawee, and on acceptance his undertaking becomes collateral to that of the acceptor, who is then regarded as the principal debtor. The primary resort for payment is to the acceptor, and it is only on his default and after due notice to the drawer, that the latter becomes liable to pay the holder. When the bill is paid and taken up by the drawee, it ceases to be obligatory upon any of the parties; it has performed its office, and is no better than a piece of blank paper, except as the memorial of a past transaction. These principles are so nearly elementary, that I shall only refer to a few cases. *Cruger v. Armstrong*, 3 Johns. Cas. 5. *Simmons v. Parmenter*, 1 Wils. 185. *Vere v. Lewis*, 3 T. R. 182. *Thompson v. Morgan*, 3 Campb. 101. *Rayborg v. Peyton*, 2 Wheat. 385. Chitty on Bills, Phila. ed. 1826, 1, 182. 2 Stark. Ev. 302, 275.

The presumption that the drawer has funds in the hands of the acceptor may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer; and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obligation the acceptor may have an action against the drawer, *but not on the bill itself.* *Young v. Hockley*, 2 Wils. 346. *Chilton v. Whiffin*, id. 13. Chitty on Bills, 344, 410. Chitty, jun. on Bills, 38, 40. 2 Stark. Ev. 276. As between the drawer and the drawee, the bill is a mere request or direction to pay money; it never speaks, as it does between other parties, the language of contract, or imports any obligation. When the acceptor sues, whether he declares specially on the implied promise to indemnify, or generally for money paid, the bill itself is not the foundation of the action; it is but an item of evidence. So if one man lend his own note to another, and is afterwards obliged to pay and take it up, the law will imply a promise on the part of the borrower to indemnify the maker; but surely, the maker

Griffith v. Reed.

could not sue the borrower on the note itself. The thing is preposterous. It would be no less absurd to suppose that an accommodation acceptor can maintain an action against the drawer on the bill itself. When a note is paid by the maker, or a bill by the acceptor, its vitality is gone. It ceases to be a binding contract upon any one.

In the case at bar, the plaintiffs have not thought of suing on the bill. They go on an implied assumpsit to refund the money, which they say springs out of the fact that they paid the bill without having funds of the drawers in their hands.

This brings us to an insuperable difficulty in the way of maintaining this action. Reed is a *surety*, and the plaintiffs seek to charge him, not on the contract which he made, but on one which they say may be implied by law. No case was mentioned on the argument, nor do I know of any where the law will imply a promise or obligation against a surety. He is bound by his express contract, and by that only. Had the bill been protested for non-payment, the payee or other holder could treat him as one of the joint drawers, and have a remedy on the bill itself. His undertaking was, as we have already seen, that the Bill should be accepted and paid. That was his contract, and he was bound by it. But he made no agreement whatever with the drawees of the bill. See *Douglass v. Reynolds*, 7 Peters, 113.

If this seems a narrow view of the question, let us see what was the fair import of the transaction. And first, what was the language of the bill to those who took it? The payee and every other holder, on observing that Reed was a surety, would at once read the bill thus: Dixon is the principal; it is a debt due to him that the bill purports to transfer; it is Dixon, and he alone, that has dealings with the drawees. But, for the purpose of inducing us to discount and advance money on the bill, Reed has become the surety of Dixon, and both agree that the bill shall be accepted and paid by the drawees. If not paid, we shall have a remedy against both; but we must take care not to have any negotiations with the principal which may prejudice the surety.

Griffith v. Reed.

And here I may remark that Reed, as well as every one else, had a right to suppose that Dixon had funds in the hands of the drawees.

What was the language of the bill to the drawees when it was presented to them? They could not but read it thus—Dixon is the principal—he draws on us, and Reed has lent his name as a surety. Dixon agreed with the holder that we should accept and pay, and Reed was a surety for the performance of that contract; he became such surety for the purpose of inducing the payee to discount the bill and advance the money to Dixon. The bill is not drawn on the funds of D. & R., but on the funds of D., the principal. If we pay the bill, we must charge the money to his account. If he has no funds with us, and does not provide them, we must look to him on the implied undertaking to refund the money. Now this is precisely the way in which the plaintiffs did read and reason upon this bill. They had dealings with Dixon—they understood that the bill was drawn on his account, and to him they charged the money. They judged rightly in doing so. The afterthought of bringing this action was, to say the least of it, a mistake.

I have noticed the two facts that Dixon had dealings with the plaintiffs and that they charged the money to his account, for the purpose of showing that they have not been misled. They did not pay the bill under any impression that they could resort to Reed and compel him to refund the money. But I do not consider those facts material in making out a legal defence. When they saw on the face of the bill that one of the joint drawers was a surety for the other, they were bound to know that they accepted and paid for and on account of the principal, and him only.

We were told on the argument that the original theory of a bill of exchange, which supposes funds in the hands of the drawee, is no longer true; but bills are now more commonly drawn without, than with funds; and that our adherence to the old doctrine would shake a multitude of commercial transactions. It is no doubt true that bills are now very commonly drawn for purposes quite wide of their appropriate office, and I think it equally true that this mode

Griffith v. Reed.

of creating credit has led to the most mischievous consequences. The evil began to be seen and felt many years ago. In *Pentum v. Pocock*, 5 Taunt. 192, Mansfield, Ch. J., said, "the paying respect to accommodation bills is not what one would wish to do, seeing the mischiefs arising from them;" and Heath, J., said, "the courts had gone much too far in lending support to these mischievous instruments, the evils resulting from which we see every day." Mr. Chitty, in the 6th edition of his treatise on bills, says—"The pernicious effects of a fabricated credit by the undue use of accommodation bills of exchange, drawn out of the ordinary course of trade, have been too much felt to require any observation; the use of them where there is no real demand subsisting between the parties, is injurious to the public as well as to the parties concerned in the negotiation." P. 4. If he were now to review this opinion, whether standing on this or the other side of the Atlantic, he would find no occasion to question the severity of the judgment which he pronounced in 1822 upon this species of paper. The portentous cloud which at this moment hangs over the whole commercial world, has gathered much of its fearful aspect from the modern practice of fabricating credit by means of bills drawn out of the ordinary course of trade.

There is nothing, then, in the fact that accommodation bills are in common use which should induce us to give them any new sanction. We do not deny their validity. We only adhere to an old and well established rule of law. Although many bills are drawn where there is no real demand subsisting between the parties, we cannot presume that such is *always* the case; and if we could, we cannot impart a new quality or force to the instrument, and make it speak the language of contract as between the drawer and the drawee. We must go this length before the plaintiffs can make out a cause of action against the surety.

Report set aside.

THE PEOPLE vs. RATHBUN.

The uttering and publishing a promissory note with *forged endorsements* upon it, is an offence within the statute against forgery, although the passing of the note is accompanied with communications which would exonerate the endorsers if the endorsements were genuine; if by possibility the endorsers may be injured, the crime is perpetrated.

The crime of *uttering and publishing* is not complete until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent or servant; thus where a note with *forged endorsements* is sent by the felon per mail from one county to an individual in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent; and the proper place of trial is the county to which the note was sent.

In respect to *misdemeanors*, where part of the offence is committed in one county and part in another, the rule of law in respect to the *venue* is otherwise; then the trial may be had in either county.

On a charge of *uttering and publishing* a promissory note with the names of several persons upon it as endorsers, all which endorsements are alleged to be forged, it is not necessary for the purpose of sustaining the indictment to prove *all* the endorsements to be *forgeries*; it is enough that one or more are shown to be forgeries.

It seems, that the uttering here of a *counterfeit foreign bank bill*, the circulation of which is made *illegal* by statute, would be deemed an offence within the statute, if laid to have been passed with the intent to *defraud the bank*; though the indictment would be bad if laid to have been passed with the intent to *defraud the receiver* of the bill.

The forming and expressing an opinion by a juror upon the guilt or innocence of a party on trial for a felony, is a *principal cause of challenge*; the mere *forming* of an opinion is enough.

Where, on a trial for felony, the prisoner by his counsel consents to substitute the *court* for *triers*, upon challenges to jurors, such consent cannot afterwards be *revoked* and a demand made that a challenge to jurors shall be passed upon by *triers*, especially after the challenge has been passed upon by the court.

A *bill of exceptions* lies for refusing *triers*, or upon any question arising upon a challenge to jurors, in a case where *triers* may be demanded.

It is competent, in support of a prosecution, to prove that the prisoner advised an *accomplice* to break jail and make his escape.

Evidence that the prisoner refused to escape and go beyond the reach of the process of this state, after being apprized of the charge brought against him, although he was advised to do so, and it was entirely practicable to have made his escape is inadmissible.

On the trial of an indictment, as well as of a civil action, it is competent to the judge to express his opinion to the jury upon the *weight of the evidence*,

The People v. Rathbun.

provided that such opinion be not expressed in the form of a direction as matter of law ; whilst what is said is merely advisory, the charge will not be reviewed.

Whether a jury in a criminal case are concluded by the instructions of the judge upon *matter of law*, or whether they are the sole judges of the law as well as the facts of the case, *quære*.

Observations as to the proper matter of a bill of exceptions in a criminal case.

INDICTMENT for forgery. Benjamin Rathbun, the prisoner, being in the city of *New York*, enclosed in a letter directed to *David E. Evans*, of *Batavia*, in the county of Genessee, three promissory notes, of \$5000 each, drawn by himself, and *purporting* to be endorsed by *eleven individuals*, to whom the notes were made payable ; desiring Mr. Evans to make and send to him three notes of similar amounts, drawn by Mr. Evans, payable to the prisoner, and to keep the notes sent to him for his indemnity. The letter, with its inclosures, was post marked at New York on 13th April, 1836, and was received by Mr. Evans at *Batavia*. The prisoner, previous to this time, had been a resident at Buffalo, and engaged in very extensive business operations. Mr. Evans made and sent his notes as requested. Subsequently it was discovered that the *endorsements* upon the notes sent to Mr. Evans were *forgeries* and at the Genessee oyer and terminer, held in October, 1836, the prisoner was indicted for the felony committed by him. The indictment contained several counts, charging the offence in different forms. The *third count*, charging the prisoner with *uttering and publishing* one of the notes, describing it as a note dated at Buffalo, on the 15th April, 1836, made by the prisoner, for the sum of \$5000, payable at the Manhattan Bank, in the city of New York, four months after date, to the order of *Hiram Pratt*, and ten other individuals, and *purporting* to be endorsed by the payees, he knowing the endorsements to be forged, with the intent to defraud the individuals whose names appeared as endorsers. The trial came on in September, 1838, at the Genessee oyer and terminer, before the Hon. NATHAN DAYTON, one of the circuit judges, and his associates.

The People v. Rathbun.

Before calling the jurors, it was suggested by the court that if objections were taken to jurors called, either party had a right to have *triers* appointed to pass upon the facts, and determine whether the jurors *were or were not indifferent*; but if *this were not insisted on*, it would be more convenient and perhaps desirable, under the circumstances of the trial, to have each juror, when called and appearing, *sworn to answer such questions* as should be put to him relative to his having formed and expressed an opinion as to the guilt or innocence of the prisoner, of the charges upon which he was to be tried. No objection being made to this proposition by counsel on either side, each juror who appeared was sworn and examined as to his having formed or expressed an opinion as to the guilt or innocence of the prisoner. After the regular panel was exhausted, Elijah Grey, who had been summoned as a talesman, being called, the counsel for the prisoner interposed a challenge against his sitting as a juror, on the ground that he was not an indifferent jurymen, but had formed and expressed an opinion against the innocence of the prisoner. On being examined, he testified that he had neither formed nor expressed an opinion as to the guilt or innocence of the prisoner; that he had conversed but little on the subject before coming to Batavia to court, but that he had heard some conversation in the tavern at Batavia since he had come to court; that, in the morning before he was summoned, some person might have said to him that if public opinion was to prevail, Rathbun, had he been a poor man, would have been in state's prison long since; that he believed such a remark was made, and that he, Grey, might have assented that such was the public opinion; but that he had long since learned the impropriety of making up an opinion on hearsay reports, and had not made up any in this case. The counsel for the defendant then objected that Grey was not an impartial jurymen in the cause, and moved that *triers* should be appointed. The court denied the motion, and decided, that after the counsel had examined a jurymen on oath before the court without asking for *triers*,

The People v. Rathbun.

it was too late to call for them, and that the defendant had waived his right to have triors appointed; that the court were then the triors. The court overruled the challenge and objection of the defendant's counsel, and decided that Grey was an indifferent juror, and he was sworn of the jury accordingly. The prisoner's counsel excepted on the two last points, upon the ground stated in the challenge and objections.

Mr. *Evans*, the individual to whom the notes were sent by the prisoner, testified that the note in question, with two others just like it, were enclosed in a letter of the prisoner, dated New York, 13th April, 1836, together with three other notes to be signed by himself and sent in exchange, which he signed and sent accordingly. The letter mentioned that the three endorsed notes (all having on them the same eleven names as endorsers with those on the note in question) *were got for a special purpose*; that for certain reasons it was desirable to change the shape of the paper, and requested Evans to lay the three notes (with many endorsers) in his private desk, and sign and remit the three blank notes, which were for the same amount. The letter stated that he had not time to make a change of such a number of endorsers; and the notes being for a specified purpose, if known to some of them that other use was made of their names, it might create some feeling. The three notes with eleven endorsers were read in evidence. *Eight* of the individuals whose names appeared as *endorsers* on the note were called as witnesses on the part of the prosecution, and proved the signatures, purporting to be subscribed by them, to be *forges*; and the genuineness of the endorsements of the three other payees was *negatived* by the testimony of several witnesses, who spoke from their knowledge of the hand-writing of the parties.

The participation of the prisoner in the forgery was sought to be shown by *Rathbun Allen*, who admitted that he was an accomplice, and it was sought to corroborate his testimony by a letter of the prisoner and memoranda made by him in the course of his business; the letter being dated at the city of New York, April 12, 1836, and directed to Ly-

The People v. Rathbun.

man Rathbun, and which it was contended related to the forgery in question, or to other forgeries or attempted forgeries of other paper, shortly before or shortly after that in question was made. Allen's testimony tended to show that it was made at the Franklin House in New York, about the 12th of April, 1836. The letter and memoranda were objected to as irrelevant, but admitted, and the prisoner's counsel excepted. They contained obscure directions and allusions, which it was insisted the jury might regard, in connection with other facts, as circumstances tending to make out the *scienter*. The prisoner's explanations how forgeries had been carried on in his business were also received in evidence against him, though objected to and an exception taken. He said they began without his knowledge, and on discovering them he could not at once check their course and disembarass himself from them. Evidence was also given on the part of the prosecution, that the prisoner advised *Rathbun Allen* the accomplice, whilst Allen was in prison, to break jail and escape: this evidence was objected to and an exception taken to its admission.

The prosecution resting, the prisoner's counsel moved the court to direct his acquittal on the third count: 1. On the ground that there was no evidence of an intent to defraud the endorsers as that count alleged; so far from that, the very letter enclosing the notes to Evans negatived such intent. It stated substantially that the endorsements had been obtained for the prisoner's accommodation, and for a definite object; and directions were given in the letter to divert them from that object: which, allowing the notes to be genuine, would discharge the endorsers. 2. Because the venue should have been laid in the city and county of *New York*, where the notes were mailed, and not in *Genessee*, where they were received. The court denied the motion.

The defence, as opened by the prisoner's counsel, was placed on several grounds: 1. That the names of the several endorsers were not forged. 2. If they were, the prisoner had no knowledge of their being so, he relying on his financial agent, Lyman Rathbun, to procure endorsers for him at all times, himself giving no attention to such matters. 3.

The People v. Rathbun.

that Allen was not to be believed. Evidence was accordingly given tending to establish these propositions, and among others, the testimony of Lyman Rathbun, taken under a commission at Texas.

It had appeared that the prisoner had, in July or August, 1836, after the forgeries were imputed to him, made a general assignment of his property in trust for all his creditors; and it was proposed, in his behalf, to prove that *all his property* had been taken possession of by his assignees, which was overruled, and an exception taken.

It was also proposed to prove, that after such imputation and after the assignment of his property the prisoner was advised to escape and go beyond the reach of the process of this state, and that he refused to do so, although it was entirely practicable for him to have made his escape: but the court refused to receive the testimony; upon which another exception was taken.

The prosecution gave evidence in reply; and, among this were a series of twelve letters, part of which were written by the prisoner to Rathbun Allen, the dates ranging from the 10th of March to the 1st of April, 1836; and also letters from him to Lyman Rathbun, ranging from that date to the 19th of April, 1836. These were proposed, 1. as showing his intimate knowledge and particular supervision of his pecuniary concerns, as well before as after the 13th of April, 1836; 2. as to some of them, in order to show the defendant's knowledge that the names were forged; and 3. to corroborate the testimony of Allen. They were objected to, especially those written after the endorsements in question were made; but they were all received, and the defendant's counsel excepted.

The prosecution then introduced in evidence certain memoranda, some in ink and some in pencil, which witnesses gave their opinion were in the prisoner's hand-writing. These were objected to, as neither sufficiently proved nor relevant; but were received, and the defendant's counsel excepted.

The testimony being closed, the defendant's counsel insisted to the jury, that the three grounds of defence stated

The People v. Rathbun.

in the opening had been sustained ; that none of the counts, save the third, could with any propriety be insisted as made out in proof ; and as to that, the venue was wrong ; nor was there the least proof of an intent to defraud. The counsel also insisted that the forgery could not be regarded as proved beyond reasonable doubt, which should be removed from the mind of the jury before they could convict.

The court charged the jury, 1. That the venue was properly laid in the county of Genessee. 2. That, as to the prisoner's fraud being negatived by the instructions in his letter to Mr. Evans, the court had already expressed an opinion that the objection *was without foundation*. That the case was made out, whether the endorsers could, on genuine paper, have been made liable or not ; if Evans could not have collected the note on account of having notice, yet such a defence must depend on collateral evidence ; it not appearing on the face of the paper, which was apparently obligatory, and thus *might be* the subject of the offence charged. Such collateral matter furnished *no ground* for acquitting the defendant, whatever might be its effect in a civil suit against the endorsers. Whether the endorsements were forged was for the jury to decide, on the evidence, which the circuit judge summed up, and said among other things, that as all the supposed endorsers resided or had resided in the city of Buffalo, it would be easy to procure testimony to show the genuineness of the endorsements, if they were in truth genuine. That this had not been attempted. That to the court, the proof of the forgery *seemed* very clear ; that it was much stronger than could usually be expected in cases of this kind ; but that it belonged to the jury and not to the court, to determine whether the testimony was sufficient. As to the prisoner's knowledge : if he had the forged endorsements in his possession and uttered them as true, his knowledge should be presumed, so far as to call on him for explanation, especially as the note was signed and negotiated by him personally. The notes had been used in the defendant's business and for his benefit, and he appeared to have known that genuine endorsements on like notes of the same date were in the hands of the trust company. Here the judge adverted to various proofs showing the pri-

The People v. Rathbun.

soner's knowledge of the financial branches of his business; and expressed the opinion of the court, that independent of R. Allen's testimony, the evidence appeared very strongly to show the prisoner's knowledge that the endorsements were forged when he passed the note. He left it to the jury to say how far Allen, the accomplice, stood corroborated by other evidence; and remarked, that if he had testified truly, his testimony went greatly to strengthen the evidence of knowledge in the prisoner. That the jury would, on the whole evidence, decide upon the question of knowledge. After remarking upon other evidence, the judge told the jury they were to make up their own opinions upon the law and fact of the case. That if, upon the whole evidence, they believed the defendant passed the note to Mr. Evans in the manner described by him, that the endorsements were forged, and the prisoner at the time knew of the forgery and uttered them as genuine, the jury *might* find him guilty under the third count in the indictment.

The counsel for the prisoner excepted to the charge in the above respects; and in several others wherein the court intimated or submitted to the jury that certain facts might aid them in drawing certain conclusions. Other exceptions denied, in many particulars, that the court had correctly apprehended the force of certain sets of facts or the force of the testimony of certain witnesses, which it appeared by the bill of exceptions to have been ascribed to such facts or testimony in the charge to the jury. Again: other exceptions denied that certain consequences could be drawn from certain facts of the case or the testimony of certain witnesses, which did not appear in the bill of exceptions to have been even hinted at by the charge in the manner or in any connection supposed by the exceptions. The prisoner's counsel then presented five points on which they requested the court to charge the jury, the first three of which selected certain sets of facts insulated from the whole case, and desired the judge to charge whether certain inferences could be drawn from them. On the first and third the judge charged against the prisoner, and on the second refused to charge, but left the matter to the jury; and to these three decisions the prisoner's counsel also excepted.

The People v. Rathbun.

The jury found the prisoner guilty on the third count, and acquitted him on the others. His counsel moved a suspension of the sentence till there should be time to prepare the requisite papers, and take the proper steps to stay judgment till the opinion of the supreme court could be taken. This motion was denied, and the prisoner's counsel excepted. The prisoner was then sentenced to the state prison for the term of five years. The proceedings were brought into this court by writ of error.

S. Stevens, & J. A. Spencer, for the prisoner.

Willis Hall, (attorney general,) for the people.

By the Court, COWEN, J. I think none of the exceptions to the admission or rejection of evidence were well taken. The objections to admission were in the main professedly founded on irrelevancy, which always depends upon the object for which testimony is offered. While many times it may not be obviously relevant, when referred to the issue upon the record, it becomes quite material for the purpose of collateral issues arising in the course of the cause. The direct issue was the forgery and the fraudulent uttering of the note mentioned in the third count, and much of the testimony objected to tended to make out the *scienter*. This was, among other things, sought to be proved by *Rathbun Allen*, an accomplice, while it was sought to be repelled by inferences from the great extent and complication of the business of the prisoner, and his ignorance of his money matters, which were conducted by others. The jury were asked to infer that forgeries, therefore, had been mingled with his genuine paper without his knowledge, and that his negotiating such forged paper was a mere mistake. To show the *scienter*, or sustain the accomplice, or repel the inference mentioned, or to answer all three of these purposes, the letters, memoranda and declarations of the prisoner, embraced by the exceptions, were plainly admissible.

One of the exceptions, and I do not know but more, complains that evidence tending still farther to show the extent, variety and complication of debts and business, was

The People v. Rathbun.

overruled. It is a somewhat singular ground of defence, at best, that forged paper, conducing to a man's individual and exclusive profit, has been made and mingled in his affairs by some third person. It assumes that there is a disinterestedness and generosity in crime, which, I apprehend, is without the pale of presumptive evidence. I cannot say I should have been dissatisfied had all the evidence which was proposed to fasten voluntary forgery on others been excluded. The account is more natural, as given by the accomplice, that if he forged the endorsement, it was as an instrument used by the prisoner.

The remark by the judge, that the paper or transaction purporting to be for the prisoner's benefit and operating so in fact, might be considered as weighing against him, seems to have been better in accordance with the philosophy of the human mind. Truly, a note drawn by one who passes it with forged endorsements, seems, as the judge said, not only to call for an explanation from him how that could innocently be, but a much more satisfactory explanation than was given. The doctrine was laid down much more strongly against the prisoner in *State v. Britt*, 3 Dev. 122, 125, by Mr. Justice Ruffin.

That the prisoner advised Allen, the accomplice, to break jail and escape, he being charged with the crime imputed by this indictment to the prisoner, might have been regarded by the jury either as indicating a desire to get him out of the way, and thus to prevent his being a witness, or as betraying a guilty knowledge of the crime which the prisoner assumed for the foundation of his advice. It is hardly to be supposed that he would interfere thus to defraud justice, without being a colleague in the guilt which the advice supposed. One of the commonest effects of a community in crime, is the undetected accomplice lending a hand for the escape of his more unfortunate associates. It is one means of escape usually looked to in a copartnership of guilt—a circumstance which more than any other renders our jails insecure.

It was offered to show that the prisoner, although advised by his assignees to escape and go beyond the reach of pro-

The People v. Rathbun.

cess, and having an opportunity to do so, declined; and it is supposed that the admissibility of such proof, follows from the rule which turns an attempt to escape against the prisoner. A strong declaration of *Hume*, in his treatise on the trial of crimes, that such a fact should be received as conclusive against any case sustained by circumstantial evidence merely, was cited. But the difference between an attempt to escape, and refusal to escape, whatever degree of moral conviction the latter might carry to the mind of the writer, is quite obvious when they are offered as legal evidence. The attempt implies guilt, and operates against the party like a confession. The refusal is an act and confession in his own favor. Once receive it, and the criminal courts will be loaded with such evidence. It is almost as easily manufactured as a declaration of innocence. The prisoner and his friend may introduce a third person to give the advice and hear the refusal, who may be a witness with perfect integrity. A dupe himself, he may testify to the fact without being guilty of perjury; and thus the practical working of Mr. Hume's rule would in effect neutralize the force of all circumstantial evidence—a species of evidence which is in general the only resort for the establishment of infamous offences, and, when received under proper caution, is at least equally satisfactory with the most positive proof. The ease with which an *alibi* is said to be got up and maintained by perjury, renders it a very suspicious kind of proof. So the art with which *insanity* may be counterfeited. But the false declaration of innocence, or subsequent acts which appear to indicate it, are too common a resort to be regarded as even admissible.

The question whether the assignees had not taken possession of the whole property of Rathbun, pressed with a view to infer his original integrity, was inadmissible for the same reason. Acts and declarations which are a part of the *res gestæ* are admissible. Thus, on a trial for a riot in destroying a threshing machine, the defendant's witness was allowed to state that he and the defendant were compelled to join the mob; but they had before agreed to run away the first chance: which they did, the witness in ten minutes,

The People v. Rathbun.

and he being joined by the prisoner in a quarter-of an hour after. *Rex v. Crutchley*, 5 Carr. & Payne, 133, and see the note to that case. Farther than this, the common law cases do not go. Mr. Hume wrote on the Scotch law. In *The State v. Scott*, 1 Hawks, 24, both the declarations and conduct of the prisoner, the next morning after the homicide, were repudiated as incompetent evidence even of insanity.

I am satisfied with the charge of the judge. The branch of the charge mainly relied on for error, is the refusal to direct an acquittal, on the ground of the advice in the letter which enclosed the note and endorsements to Mr. Evans, that they were made for a special purpose, and a request to lock them up. This advice, and this request, it is said, absolutely negatives all fraudulent intent against the endorsers, the only persons whom the prisoner was accused of intending to defraud, in the count upon which he was convicted. Negotiating the note, if supposed to be genuine, it is said, would be a perversion of it, and a defence would, therefore, be absolutely available against it in the hands of the holder. I do not understand the judge to have denied all weight to such a circumstance; but merely to say that the offence might, notwithstanding, be complete, or be considered as made out in evidence. The natural consequence, admitting the endorsements were genuine, was to charge the endorsers. The note was sent to Evans with the view of raising money, and had that effect. Had he found himself in danger, he would have sought to charge the endorsers. A demand and notice would follow; and they might fail in their defence, so far as it respected the mal-appropriation of the paper. Their witnesses might be out of the way, or they might have none. Even supposing the instructions to be a defence, Evans might conceal them, and Rathbun could not be a witness, for he would be interested to clear his endorsers, if they had acted, as the letter supposes, for his accommodation. In this case he was the person primarily interested. He uttered the endorsements as true; and the law imputes an intent that they should have the ordinary effect of genuine paper. *Rex v. Mazagora*, Russ. & Ry. Cr. Cas. 291. If they *might* work a

The People v. Rathbun.

fraud upon the endorsers, that satisfies the statute. Suppose Evans had negotiated them to a *bona fide* holder, then, at all events, the defence would have been gone.

It is only of an instrument nugatory on its face, that the law forbids forgery, or a fraudulent uttering to be predicated. *Rex v. Burke*, Russ. & Ry. 496. A devise of land with only two witnesses, is the case usually put. An instrument valid on its face, is equally the subject of felonious forgery, or a felonious uttering, though collateral or extrinsic facts of whatever character may exist, that would render it absolutely void if genuine. *Heath's cases*; 2 City Hall Rec. 54. 2 Russ. on Cr. 317 to 328, Am. ed. of 1836. *Rex v. Mackintosh*, 2 Leach, 883, 4th ed. *Rex v. Froud*, 1 Brod. & Bing. 300. *United States v. Mitchell*, 1 Baldwin's Rep. 366, 368. *Butler v. The Commonwealth*, 12 Serg. & Rawle, 237. This question was much considered in the late case of *The People v. Stearns*, ante, 409, wherein most of the material cases are cited. *The People v. Davis*, M. S. May term, 1837, in this court, was relied upon by the counsel for the prisoner. That was the case of a three dollar counterfeit bill, purporting to be issued by a foreign bank, passed in order to defraud the taker. The passing of such a bill, though genuine, was declared by statute to be penal. Several cases have held, therefore, that if the bill be counterfeit, the act of uttering cannot be legally adjudged a defrauding of the receiver. He is bound to know the statute, and that the bill is unavailable in his hands whether genuine or not. It was supposed, on the argument, that an indictment for such an uttering with intent to defraud the foreign bank, would not lie. I don't know that this has been distinctly held. Perhaps it would lie; for the manner of its being passed would be collateral, and not known to the bank. It might be put to expense in defending itself against an action on the bill; and it might not, after all, succeed in the defence. The case of *The People v. Wilson*, 6 Johns. R. 320, is, however, the leading authority that a felonious uttering is not predicable of a counterfeit foreign bank bill, the circulation of which, though genuine, is made illegal by statute. There were two counts in that case, one for uttering a bank

The People v. Rathbun.

bill with an intent to defraud the person to whom the bill was passed ; the other to defraud some person or persons, body corporate, &c. to the grand jury unknown. The court held the indictment bad ; and declared generally that the act of illegally passing such a bill was not indictable as a felony. If it could be supposed, as it well might in some cases, that such a bill were uttered to defraud the bank, which is of course a stranger to the transaction, then the common and well established principle, that extrinsic matter of defence is not a conclusive answer to the imputation of fraud, would apply. The common object and common effect of passing a counterfeit bill is merely to defraud the taker. To that the attention of the court was, of course, mainly directed in the cases cited. It is not for him to complain that he has been defrauded in a matter of dealing which the law forbids him to participate in under a penalty, and where, as a consequence, he must know that he could not be defrauded in a legal sense. Strictly, the bill, if genuine, would not be collectable in his name, the contract of purchase being void. It is like a man complaining that a forged note had been uttered and passed to him as true, in order to induce him to commit a misdemeanor. To constitute a felonious uttering, the note must not only be put away as true, but it must be innocently taken. See *Butler v. The Commonwealth*, 12 Serg. & Rawle, 237. The principle here is not that the paper is void on its face, under all circumstances, like that in *Rex v. Moffat*, 1 Leach, 431, 4th ed.; 2 East's P. C. 954, S. C.; *Rex v. Burke*, Russ. & Ry. Cr. Cas. 291, or *The People v. Shall*, 9 Cowen, 778; but that there is no uttering with the particular intent to defraud the taker, which is the crime charged. There may well be no such intent in regard to him ; and yet an intent to defraud the bank. It is enough if the utterer have that intent even though the immediate disponent know the bill to be counterfeit, if the latter be innocent in the act of receiving; as if he procure the bill to be passed to him, knowing it to be counterfeit, in order to prosecute the utterer, and convict him. *Rex v. Holden*, 2 Leach, 1019, 4th ed. The quality of intent in the utterer, is all that the statute requires. Id.

The People v. Rathbun.

2 R. S. 562, 2d ed. § 39. The intent is not confined by statute, as necessary to be aimed at any particular person. And although the law will not allow such intent to be predicated specifically of the act of uttering or publishing as true *to the guilty taker*, that is not necessarily incompatible with its being an offence in respect to some other person or body politic or corporate. In *Rex v. Mazagora*, Russ & Ry. 291, a forged Bank of England note was charged to have been disposed of with intent to defraud the bank. The jury found that the prisoner sold the note to defraud whoever might take it; but the intent to defraud the bank did not enter into her mind; yet the indictment was held to have been supported by the finding. The indictment under our statute, of uttering, need not name any person to whom the bill was uttered, though the person intended to be defrauded must be named. Roscoe's Cr. Ev. 399, 400, Am. ed. of 1836. The usual and safer way is, to state an uttering generally, naming the object of the fraud. *Id.*

I am, therefore, strongly inclined to think that, in *The People v. Wilson*, and the like cases, a count charging that the intent was to defraud the foreign bank, might have been sustained, on the mere proof of the fraudulent uttering, which was proved. We are bound to look at *purport* and simulation. What is the transaction on its face? What is the obvious intent and the probable consequence? What does the false utterer say when he passes the note? What but that "here is an instrument which will call so much silver from the vaults of the bank? And is the conduct of such a criminal to be looked upon benignly, and taken out of the general rule, which holds a man responsible for the consequences which he apparently aims to accomplish? Even if he disguise it, by giving special instructions, calculated to divert, hinder or delay the forged paper in its natural and onward course, must he, of all others, have implicit credit for his avowal of integrity? Are we bound to rely on a declaration, so glaringly inconsistent with his conduct? In no case are we necessarily bound even by the exculpatory part of a declaration given in evidence against a prisoner. It is a rule of evidence, that the declaration shall, *prima facie*, be taken

The People v. Rathbun.

together; yet jurors are authorized to believe the inculpatory side only, if the circumstances be incompatible with that part which sets up the pretension of innocence. If a man will, with an apparent intent to kill, direct and discharge his musket at the vitals of a fellow citizen, shall he be allowed to escape, because he, at the same time, tells us that he intended no harm? In *Rex v. Birkett*, Russ. & Ry. Cr. Cas. 86, the prisoner had pledged a forged bill to his landlady, knowing it to be forged, as security for his reckoning. The bill was payable to his own order, but was not endorsed. He told her he should pay his reckoning in a few days, and his landlady swore that she considered herself merely as keeping the bill for him, and knew she could make no use of it, till the prisoner endorsed it. The judge told the jury the fraudulent intent in the uttering was made out, without leaving it to them whether the prisoner did not all the time mean to take back the bill and defraud nobody, paying the landlady what he owed. The twelve judges held the direction right, as the bill had been delivered in order to obtain credit.

It is said that the judge erred in advising that the forgery of the endorsements was sufficiently proved. Most of the endorsements were directly disavowed under oath by the persons whose names were alleged to have been forged. The exception is founded partly on the fact that some of the witnesses, the supposed endorsers, were not correct in several particulars; collateral to the main fact which they swore to. This did not necessarily impeach either their credibility or accuracy as to the fact that they had never endorsed. The same thing may be said as to the objection that some of the endorsers had contradicted themselves, or acted inconsistently, or had been active in promoting the prosecution; or had betrayed a vindictive temper towards the prisoner while upon the stand. They might be, and in truth were, so strongly confirmed, as to warrant the judge in pronouncing them perfectly credible. The accounts given by other witnesses called to negative the handwriting of endorsers, (for the denial, as to a few, rested upon the opinion of witnesses, direct evidence from the endorsers not being

The People v. Rathbun.

attainable,) it is also supposed were not satisfactory in all particulars. This is very common in opinions as to handwriting; but it is too much to say that it necessarily detracts from credibility. Looking at the whole evidence in the bill, the testimony is quite strong that the endorsements were forged, and, at least, as to a large majority of them, it seems difficult to raise a doubt. Eight of the endorsements were directly denied by the men whose names were alleged to be forged; and the three others were shown to be simulated, by witnesses well acquainted with the true handwriting of the persons whose names were endorsed. The forging, or knowingly uttering of a single forged name, would have completed the offence. Every endorser, therefore, who was sworn, may be considered as having furnished cumulative evidence that the paper was false. These were each fortified by the opinions that other names were forged; and altogether were still farther sustained by numerous and imposing circumstances disclosed in the course of the testimony for the prosecution. The point, raised at the close of the trial, and hastily conceded by the judge, that, to warrant a conviction, all the endorsements must appear to have been forged, was putting the matter in a singularly favorable light for the prisoner. It was saying, that if one out of the eleven alleged forgeries be found genuine, there must be an acquittal; whereas, it is enough that the substance of the issue be proved. The offence of uttering a note on which only a part of the endorsements were proved to be forged, was within the indictment, though that averred all the names were forged. It was like charging the simultaneous uttering of eleven forged instruments of a certain description; for each endorsement on a note is equivalent to a separate bill of exchange. In *Rex v. Thomas*, 2 Leach, 877, 4th ed. 2 East's P. C. 934, S. C. the prisoner was indicted for uttering, at the same time, and as one offence, a great number of acquittances or receipts particularly described in a single count; and the count was held good. Can it be possible that where you allege the uttering of eleven forged instruments, the prisoner must be acquitted because one turns out to be genuine? So of a note

The People v. Rathbun.

with eleven forged endorsements. If ten, or only one be forged, it makes the substance of the offence charged. Nobody would think of objecting that a charge of stealing a dozen watches, could not be supported by proof of stealing a less number. The accused may always be convicted of part and acquitted of the residue in the same count, when the matter is divisible. 1 Chitty's Cr. Law, 637. And the averment that all the endorsements were forged, was not so much matter of description, that proof of a less number would have amounted to a variance.

It is perfectly well settled that the judge may, as well in a criminal as a civil action, express his opinion to the jury on the weight of the evidence. *The People v. Haynes*, 11 Wendell, 557, 562. Such expression is to be understood as merely in an advisory sense, unless put in form of a direction as a matter of law. Here the judge expressly referred the material questions of fact to the jury as the proper judges. The charge that the crime was complete, notwithstanding the instructions and cautions in the letter to Evans, was, I have supposed, no more than a negative to the proposition of counsel, that this part of his declaration or conduct was conclusive against the imputed intent to defraud the endorsers. But if it went farther, it was afterwards expressly put by the judge, as was also every part of his charge in respect to conclusions from fact, on the ground of a merely advisory declaration to the jury. In conclusion, he told them that it was for the jury to judge, on the whole, as to the law and the facts upon every point in the cause. This was even more favorable for the prisoner than some books require. In the *United States v. Battiste*, 2 Sumn. 240, a capital case, and in *Townsend v. The State*, 2 Blackf. 451, the case of a misdemeanor, it was held that the instructions of the court upon matter of law are conclusive with the jury, in a criminal cause, the same as in a civil. The question too was much considered in the latter case, and learnedly and elaborately discussed by Mr. Justice Holman, who delivered the prevailing opinion of the court. His reasoning comes with additional force under a system of criminal law, which allows a review by a bill of exceptions of the

The People v. Rathbun.

legal questions decided. Be this as it may, there are few cases in which a judge can be warranted in telling a jury, as he was requested to do here, that a detached piece of evidence should conclude, see *Savage v. Birkhead*, 20 Pick. 167, 173; and especially where the proposition involves a question of intent to defraud.

The *venue* was, I think, properly laid in the county of *Genesee*. The statute is, that every person convicted of having *uttered and published* as true, with intent, &c. 2 R. S. 562. What is an uttering and publishing? TOMLINS says, "any *disposal* or *negotiation* of a forged instrument to another person." Toml. Law Dict. Forgery, 2. And it has very nearly a like meaning in general parlance. JOHNSON, in his dictionary, 4to, defines *utter*, "to sell, to vend," and gives an instance of its use in this sense by several writers from Shakspeare downward. It may also mean, "to emit at large or publish." Id. In the statute, however, it is used in a sense not quite so broad, if we are to judge by the English cases; and the word *disposal*, used by Tomlins, is perhaps, according to those cases too comprehensive. To *dispose* may mean "to transfer to any person," or "to put into the hands of another," or "to put away by any means." Johns. Dict. 4to. To dispose, 8, 9, 14. Accordingly, the English parliament passed two statutes, one against *uttering and publishing* and another against *disposing of or putting away*. In *Rex v. Palmer*, 2 Leach, 978, 4th ed., 4 Bos. & Pull. 96, (often cited 1 N. R.) S. C., Russ. & Ry. Cr. Cas. 72, S. C., it was held, that the prisoner delivering a forged note to his accomplice, for the purpose of being passed; the accomplice having actually tendered it for goods which she purchased, though it was refused by the vendor, was a disposing of or putting away by the prisoner. Rooke, J. said that the prisoner could not recover it back from the accomplice by an action; that the objection of the possession still constructively continuing in the prisoner was a fiction, which should not be applied to defeat a criminal statute; and that any delivery to another with a fraudulent purpose was an offence within the words "dispose of or put away." *Rex v. Giles*, 1 Mood. Cr. Cas. 166, S. P. The offence of *uttering*

The People v. Rathbun.

had been provided for by a previous statute; and in *Rex v. Palmer* there was a count for that, as well as for disposing, &c.; but the judges hesitated, and forbore to determine whether the prisoner was guilty within the former statute. The word *uttering* would seem to be more accurately defined by *negotiation*, which means, in popular use, an intercourse of business, trafficking or treating. Johns. Dict. 4to. *To negotiate*. Accordingly, not only a sale or paying away a counterfeit note or endorsement, but obtaining credit on it in any form, as by leaving it in pledge, *Rex v. Birkett*, Russ. & Ry. Cr. Cas. 86, or indeed offering it in dealing, though it be refused, *Rex v. Arscott*, 6 Carr. & Payne, 408, *Rex v. Shukard*, Russ. & Ry. Cr. Cas. 200, *Rex v. Palmer*, before cited, amount to an uttering and publishing. In the latter case, the general opinion of the judges, was, that if the prisoner had delivered the forged note to an innocent person for the purpose of having it passed away, this, *per se*, would have been a guilty uttering by the prisoner. At least, the doctrine is so stated by the report of the case in 2 Leach, 981, though I understand the report in 4 Bos. & Pull. 97, not to consider the uttering as complete until the innocent agent should have tendered the note in payment. Indeed this would seem to be the true sense of both reports; for the judges are represented as basing themselves on the doctrine in Foster's Crown Law, 349, that "where an innocent person is employed for a criminal purpose, the employer must be answerable." Now all the cases put by Foster are these of an offence completed by the innocent agent. One is of poison knowingly prepared and delivered by A. to D. with instructions to administer it to B. The agent D. delivering it according to instructions, being ignorant of its quality, and B. dying of the poison, A. is guilty as a principal, though absent from the place of delivery. And he says the law is the same in the case of inciting a madman, or a child not at years of discretion, to commit a felony in the absence of the instigator. So Hale says, "A. lets out a wild beast, or employs a madman to kill others, whereby any is killed. A. is principal in this case, though absent, because the instrument cannot be a principal. 1 Hale, P. C. 615, Lond.

The People v. Rathbun.

ed. of 1800. The principle of these cases is that the really guilty man shall be deemed present, and in construction of law the actual perpetrator of the mischief at the place where the crime happens to be consummated. This too is the notion which was applied to a fraudulent uttering in *Rex v. Collicott*, if the reporters, nearest cotemporary with that case are to be relied on. It is reported in several books, 2 Leach, 1048, 4th ed. ; 4 Taunt. 300 ; Russ. & Ry. Cr. Cas. 212 ; the latter materially disagreeing with the former as to the decision. In that case the indictment was, in several counts, for uttering, vending and selling forged medicine stamps. The venue was laid in *London*, according to Leach and Taunton. The forgeries were concocted by the prisoner in *Middlesex*, and there pasted on the outside of the medicine bottles. These were all done up in a package which was superscribed with a direction to "Messrs. Wood & Cunningham at Bath," from whom the prisoner had previously received an order so to direct the package ; but they were innocent of the forgery and uttering. The prisoner delivered the package thus directed, to a lad, as his porter, at his shop in *Middlesex*, to carry to the C. & F. inn, at Aldersgate-street, *London*, in order that it might be conveyed by R.'s waggon, thence to the consignees at Bath. The prisoner helped to put the package on the lad's shoulders, and wrote a letter to the consignees, advising them of his having sent the medicines according to their order ; and in the package enclosed an invoice or bill of parcels. The package was delivered by the lad at the *London* inn, and thence was carried by the waggon, in due course to Bath, where the innocent consignees opened it and exposed the medicines for sale with the forged stamps pasted upon them. The order of the consignees was general, that the medicines should be sent to them, and on the package arriving they paid the carrier for bringing it. A majority of the judges held the offence was complete in *London*, and the venue properly laid there, according to Leach and Taunton ; but the difference among them being serious, the question was not finally decided. I have collected the facts from Leach, and Russell & Ryan, the latter stating them the most fully ; though there

The People v. Rathbun.

is a singular discrepancy between the two earlier reporters, Leach and Taunton, on one side, and Russell & Ryan on the other. They all concur that the prisoner was tried at the Old Bailey, which was in *London*—the two former saying the *venue* was laid there, and that a majority of the judges held the offence complete there. Russell & Ryan, however, state the *venue* as having been laid in *Middlesex*, and that a majority of the judges were of opinion that there was an uttering and vending in *Middlesex*, while a minority thought not. The latter reporters state the division as standing six to five, and give the names thus: "At a meeting of all the judges, the majority, viz. Lord Ellenborough, Mansfield, Ch. J., Grose, J., Thompson, B., Le Blanc, J. and Bayley, J. thought it an uttering and vending in Middlesex; Heath, J., Lawrence, J., Chambre, J., Graham, B. and Wood, B. thought not." On the argument, they make the prisoner's counsel contend that no uttering was proved in the county of *Middlesex*, the prisoner not having parted with the possession there; but the package remained in the care and custody of his servant all the time while there, and it was under the prisoner's control all the time while it remained in Middlesex, so that he might countermand the sending and delivering of it. The like objection was applied to the counts for vending and selling. The same account is given of the case by a judge who took part in the decision, Bayley, J. *arguendo*, in *Rex v. Burdett*, 4 Barn. & Ald. 154, except that he makes the division seven to five. This was in 1820, and Russell & Ryan's Reports were published in 1825; Taunton's Report was in 1812, the very year of the decision, and Leach's in 1815. Which was correct, it is impossible for us to say. The trial being, as stated by Russell & Ryan, at the Old Bailey in London, is not decisive of the venue; for it was customary to hold the jail delivery there, as well for the county of Middlesex as London. 1 Chit. Cr. Law, Am. ed. 1836, p. 189. 2 Toml. Dic. London, p. 483, Philad. ed. 1836. Doug. 796, 7. It is stated, both by Taunton and Leach, that the case went off by the prisoner being afterwards tried for a like uttering, which was clearly in *London*. The second case is reported in

The People v. Rathbun.

Russ. & Ry. 229. The trial is stated to have been at the Old Bailey, but the venue is not mentioned. The difference between the judges being so serious, the decision was never acted upon. The English elementary writers have some adopted the first report as given by Taunton and Leach, Roscoe's Cr. Ev. 398, Amer. ed. 1836, and others that as given in Russell & Ryan, 1 Chitty's Cr. Law, 190, Amer. ed. 1836. But the question of locality was, on the whole, found so difficult to be settled, either by law or evidence, that a statute was afterwards passed in England, making forgery, uttering, &c., triable wherever the accused should be arrested or in custody, and allowing the venue to be laid there. Stat. 1 W. 4 ch. 66, § 24, cited in Roscoe's Cr. Ev. 409. *Collicott's case* is no longer, therefore of any consequence in England with regard to the venue in cases of uttering; and I have gone into its history with a view of seeing what weight it may carry as an authority with us, where the question is still open and must be met. It will have been seen that the judges were almost equally divided, and the reporters do not agree on which side the majority was. Taking Taunton and Leach's report, the uttering was held to be complete when delivered at the inn or to the carrier in *London*, and the venue to be properly laid there. According to the other report, the delivery of a sealed package to the prisoner's servant in *Mid-dlesex*, who was ignorant of its contents, and from whom it might have been immediately taken back, was held to be an uttering there, and fixed the venue. In the latter view, at least, it seems far from being a reliable case, and Bayley, J., who was with the majority, shows by what he afterwards said in *Rex v. Burdett*, 4 Barn. & Ald. 154, 5, that he had on reflection become, at least, quite diffident of his former opinion. With what propriety could the man be said to have negotiated the stamps while they remained in his own hands, or, which is the same thing, in the hands of his agent, the porter? The case seems to accord better with principle, if we consider the uttering complete when the package was left at the inn, which, under the circumstances, was a constructive delivery to the consignees at that place. The consignees had given directions to have

The People v. Rathbun.

the goods sent by a carrier, with the direction as endorsed; and nothing is better settled, than that a reception by him is a reception by the consignee, who may in virtue of the delivery bring trover for the goods. Nor is it necessary that the specific carrier should be named by the consignee. His general direction to send by *a carrier* makes any carrier, whom the consignor may select, the servant of the consignee, and that, though he even be paid by the consignor. Jeremy's Law of Carriers, 94 to 99, N. Y. ed. of 1816. But the carrier is especially his servant, where, as in *Collicott's case*, he pays for the transportation. In short, the case at London came to the same thing as if the consignees had been there, and personally received the forged stamps of the prisoner. Clearly that was a complete uttering within the strictest sense of the term. It was a sale of the stamps to the consignees. To have holden, on the other hand, that a delivery to the porter at Middlesex, who was a mere innocent instrument of the prisoner, constituted a completion of the crime, would be to say that a man may be guilty of uttering, while he himself holds a package of forgeries, without having offered them to any human being, unless it can be made out that the porter at Middlesex was the servant of the consignees, as well as the carrier at London. That, I imagine, can hardly be pretended; or if that be the point decided, it takes away all the application of the case to the one before us, in which Evans, the consignee, certainly held no privity with any one employed in carrying the prisoner's letter. Evans had given no previous direction whatever to have the letter sent. The whole originated with the prisoner. The instruments employed, the post office and its agents and servants, were his. They were innocent instruments; and if we are warranted in applying the doctrine cited from Foster and Hale to an uttering, it could not have been completed till the letter bearing the forgery had reached its destination at Batavia. That the doctrine does apply to the crime of uttering, we have already seen by *Rex v. Palmer*. That this crime admits of principles and accessories, like most other felonies, is abundantly settled by other authorities. *Rex v. Soares*, Russ. & Ry. Cr. Cas. 25. 2 East's P. C. 974. *Rex v. Davis*, Russ.

The People v. Rathbun.

& Ry. Cr. Cas. 113. *Rex v. Badcock*, id. 249. *Rex v. Stewart*, id. 363. *Rex v. Giles*, 1 Mood. Cr. Cas. 166. And we have before seen what act constitutes a simple uttering, viz. a sale, &c. or at least an offer. Tilghman, Ch. J. in *Commonwealth v. Searle*, 2 Binney, 339, says, declaring or asserting the goodness of a note is an uttering. But in *Rex v. Shukard*, Russ. & Ry. Cr. Cas. 200, it was held that merely showing forged notes, in order to induce another to believe the prisoner a man of substance, and procuring the other to keep them for him, was not enough. The judges seemed to be of opinion that to make an uttering, the forged notes should be parted with, or tendered or offered, or used in some way to get money or credit upon them. See also *United States v. Mitchell*, 1 Baldw. R. 366, 7.

Taking any of the definitions to which I have adverted, let us inquire where was the uttering of the note in question with its forged endorsements complete? Can the mailing in a sealed letter at New York be called a negotiating? Was it by that act alone parted with, or tendered, or offered or used in any way to get money or credit upon? Was its goodness thus even declared or asserted? It was secretly put in a course of transmission, through agents ignorant of its very existence; and this was all that was done at New York. Uttering implies two parties, a party acting and one acted upon. If it be by way of sale, there must be a vendee; if by pledge, there must be a pledgee; if by offer, there must be some one present to hear the offer; and if by simply declaring its goodness, there must be some one addressed as a reader or a hearer. A sealed letter cannot in the nature of things perform any of the offices mentioned, till it reaches the place of its address; and then it may perform all or any of them. The statute 27 Geo. 2, c. 15, made it felony to send a threatening letter. One was sent by an innocent agent in one county to the post in the same county, and delivered by the penny-post in another county where the venue was laid, to the prosecutor. The venue was held to have been well laid in the latter. *Girdwood's case*, 2 East, P. C. 1120. 1 Leach, 142, 4th ed. One would suppose that if it be possible to consummate a felony

The People v. Rathbun.

by letter without its being received, it would have been so in a case where the mere *sending* is declared a felony. Yet even in such case the letter completing its office by the penny-post, was held a consummation of the offence by the hand of the prisoner, though he was at the time actually in jail in another county. Thus the cases in respect to a felonious uttering and the like acts where they are made felonies are nearly uniform, that unless the agent of transmission be himself guilty, his act is deemed that of the employer at the place where the uttering is completed. It is the same in principle whether he employ one or many agents; the innocent adult, the child, or the madman of Foster, the wild beast of Hale, or the agents of the post office and the mail. The guilty employer, at whatever distance, cannot shield himself under the idea of being a mere accessory, as if his agents were guilty like himself. But he is a principal, present and acting, in legal contemplation, at the place where the crime is finally perpetrated, and he may be indicted and tried there. That place, in my opinion was, as to Rathbun, Batavia in the county of Genessee. There the letter was opened by Mr. Evans, and the transfer of negotiation of the note consummated. I am also of opinion that there was no uttering at New York, or at any place beside Batavia, within the meaning of the statute. To my mind, therefore, the case is clear enough for the prosecution. I think the attorney general was bound to lay the venue in the county of Genessee. The crime of forgery is one felony. That may be complete without any uttering and even without publication. 2 Russ. on Cr. 295, Am. ed. of 1836, and the cases there cited. Uttering is another and a distinct felony. Even delivery to a guilty agent, for the purpose of uttering, thus absolutely and irrevocably parting with the paper, and though the agent complete the uttering, leaves the employer but an accessory. The principal crime is committed by the agent. Till he has performed his office there can be neither accessory nor principal. This alone shows that the disponent must be reached. The same thing, where the agent is innocent, makes the employer a principal. The distinction lies in the doctrine of principal and accessory, a doctrine peculiar to felonies;

The People v. Rathbun.

and the distinction cannot be maintained if a mere delivery for the purpose of negotiation is in itself an uttering.

So much have I thought it necessary to say before noticing several cases of mere misdemeanor which were cited in argument and much relied on for the prisoner. They certainly do put it very strongly that the mere mailing of a letter, or giving it to an agent, with intent that it should be carried, shall in itself be deemed a publication, a sending or an attempt, and as such, indictable in the county where the act was done, though the delivery was in another. The two first were cases of libel, *Rex v. Williams*, 2 Camp. 507, and *Rex v. Burdett*, 4 Barn. & Ald. 96. In both it may be taken as holden, that the mere putting a sealed libel in the post office of one county, with intent that it should go to and perform its mischievous purpose in another, was a publication, a complete offence in the first, and indictable there. The third case was *The United States v. Worrall*, 2 Dall. 384, 388, wherein it was holden that the mailing of a letter in Philadelphia, in the district of Pennsylvania, addressed and offering a bribe to a U. S. officer in New Jersey, in another district, was in itself a criminal attempt to bribe, and indictable as such in the former district. It is unnecessary to impugn the authority of either of these cases, allowing them to rest entirely on the ground already stated, which is putting them most favorably for the prisoner. As to the two first cases, it is impossible to say that such a publication merely is a felonious uttering within the statute, though on the peculiar doctrines of libel it may be enough for the purpose of making out a misdemeanor. As to the last case, the writing and sending a letter, or mailing it in Pennsylvania for the purpose of being sent, was in itself literally an attempt there to bribe the officer, though the letter was addressed to him at his residence in New Jersey. The court said the writing and delivery were to be considered as one act, and, as far as respected the defendant, it was consummated at Pennsylvania. They thus placed it on the same footing as the libel in the two first cases; a pernicious writing published in the place where it was written. Indeed it is well settled that the bare attempt to commit a misde-

The People v. Rathbun.

meanor, or to persuade another to commit one, is in itself a misdemeanor. To this, several cases were cited in *Rex v. Higgins*, 2 East, 5 ; and no doubt the writing and mailing a letter to another, persuading him to commit a misdemeanor, is, as an attempt indictable. The doctrine of mailing libels may well be rested on this ground. The act is an attempt to provoke a breach of the peace. So, according to *Rex v. Higgins*, Rathbun might have been indicted in New York, for an attempt to commit the offence of a felonious uttering ; for it is equally well settled that an attempt to commit a felony is in itself a misdemeanor. That was the very point of *Rex v. Higgins*. The indictment was for persuading another to steal ; he refused to comply, yet the indictment was maintained. So, in the case at bar, had the letter miscarried and the felonious purpose of uttering been defeated. It being completed, however, the act which was before but a misdemeanor, makes the writer a mere accessory to, or a principal in the higher crime, accordingly as the agent was guilty or innocent.

But there is another reason why we cannot argue from the doctrine of venue in cases of misdemeanor, to that of venue in cases of felony. In the former, where the offence is made up of two material acts or events, done or happening in different counties, the venue may be laid in either. This was abundantly shown in *Rex v. Burdett*, 4 Barn. & Ald. 95, and agreed by the judges, except Bayley, J. and he was by no means clear against it. See 4 Barn. & Ald. 155. The rule was held to be the same as that advanced by *Bulwer's case*, 7 Rep. 57, in respect to a civil action. There the declaration was in trespass on the case, for maliciously outlawing the plaintiff, on a *ca. sa.* in which proceeding he was, as a consequence, imprisoned in Norfolk, where the venue was laid. But the *ca. sa.* was purchased in Middlesex, and delivered to the sheriff in London, who made the return of *non est*. Then the exigent was executed with proclamations in London, and the writ of *capias utlagatum* directed to and executed by the sheriff of Norfolk, by arresting and imprisoning the plaintiff. All these acts were held legally ascribable to the defendant, as done by

 The People v. Rathbun.

him in the several counties. The action was held to be well laid in Norfolk. So, said the court, it would have been equally well if laid in London or Middlesex; for they adopted this rule: "*In all cases* where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will." The rule is followed out by that unparalleled copiousness and variety of illustration peculiar to Lord Coke, in which its application is shown to appeals of murder and other felonies. In *Rex v. Burdett*, the indictment was for writing and publishing a libel in *Leicestershire*, where the venue was laid. There was evidence that it was written and enclosed in a letter there, and delivered to an agent with directions to deliver it to B. in *Middlesex*, who accordingly received it. One objection was, that the venue should have been laid in *Middlesex*, because the offence was not complete till the publication. A majority of the judges agreed that, admitting this to be so, the venue might be laid in either the county where the libel was written or sent, or that, where it was published. But it was admitted both by the attorney general and the judges, that, had the crime been a felony, the government must have sought out the place where it was consummated, and laid the venue there, or else it would not be indictable in either county. Abbott, Ch. J. says, the sending or carrying is the commencement of the publication; the receipt and reading are its consummation. 4 Barn. & Ald. 176. In *Bulwer's case*, the *visible wrong*, the imprisonment, was spoken of as the consummation; and that being in *Norfolk*, the venue was said to be laid there with peculiar propriety. Again, it is said, where a mortal stroke is given in one county, and the man dies in another, the death which accrued on the stroke made the felony, and the appeal was held to lie in the latter county. Again, the forging of a deed in one county and publication in another, gives an action in the latter. Other books give farther instances. An usurious agreement is made, or a draft given for usury money in one county, but the money is received in

The People v. Rathbun.

another; the receipt of the money consummates the offence, *Fisher v. Beasley*, 1 Dougl. 235. *Scott, q. t. v. Brest*, 2 T. R. 238. *Scurry, q. t. v. Freeman*, 2 Bos. & Pull. 381. Money is obtained in one county, on a false pretence made in another; the venue should be laid in the former, for the offence was consummated by receiving the money, 2 Stark. Ev. 897, Am. ed. of 1837, note (l.). *Rex v. Buttery*, cited 4 Barn. & Ald. 179. A conspiracy in one place, to obtain money from the government by false vouchers, is indictable in another where the vouchers are delivered; for the delivery consummates the offence; and a delivery by transmission in a letter through the post is within the rule. *Rex v. Brisac*, 4 East, 164. And see *The People v. Mather*, 4 Wendell, 229, 259, per Marcy, J. A man in Ireland sent a libel to be published in the county of Middlesex, England, which was done, and he was held indictable in the latter county. *Rex v. Johnson*, 7 East, 65. And see *Rex v. Watson*, 1 Campb. 215, 216.

In all these cases, had the offence been felony, and pursued criminally as such, and the action of the accused as a principal offender, could have been, as it may be in case of a misdemeanor, continued by legal construction to the place of consummation, the venue might and must have been laid there. The doctrine of election has never, as in case of civil actions, and indictments for misdemeanor, been extended as a rule to felonies. There may be exceptions; as where goods are stolen in one county and transported into another; but the reason of this is, that there is a complete felony in each county. The same exception was once thought applicable to embezzlement by servants. *Hobson's case*, 1 East's P. C. *addenda*, 24. Though in a subsequent case, the court thought it safer to look exclusively to the place of consummation. *Rex v. Taylor*, 3 Bos. & Pull. 596. 2 Leach, 974, 4th ed. Russ. & Ry. Cr. Cas. 63. The doubt, when a felony was committed by separate acts in two different counties, has been, whether it could be treated as a complete felony in either. But I shall notice presently that the doubt has no application to the case at bar.

The People v Rathbun.

In *Rex v. Burdett*, and *The United States v. Worrall*, there was direct evidence that the letters had been received according to the direction. In *Rex v. Williams*, the mailing was evidence of sending, and for this act alone the indictment was drawn. See per Bayley, J. in *Rex v. Burdett*, 4 Barn. & Ald. 154. In the two former, there was a plain right to elect the venue; in the latter, it seems to have been laid in the very county of the offence. Had the letter arrived that would have made a case of election; and perhaps the arrival may be deemed to have been shown, according to the doctrine of presumptive evidence. It would have arrived in the ordinary course of the post office, a public department; and that was a ground for the presumption, till the contrary was shown. Phill. Ev. 8th ed. 471. Per Park, B. in *Warren v. Warren*, 1 Cr., Mee. & Rosc, 252. In no view, therefore, do I think, that the decisions cited concerning misdemeanors can be applied to the case at bar. In defining and in trying felonies, the law is more careful to resolve the offence into the separate acts which produced it, with a view to distinguish between principal and accessory. Whereas, in misdemeanors, all concerned are principals, and every act tending towards its commission seems of itself to be an offence of the same grade with the final act or event; indeed, to be identified with it. Thus, in *Rex v. Burdett*, 4 Barn. & Ald. 126, Best, J., speaking of the libel, said: "The moment a man delivers a libel from his hands, his control over it is gone. He has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus penitentiae*, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act." It is evident that, to import such a doctrine into the law of felony, would at once subvert the law of principal and accessory, and, what is more pertinent to the case before us, it would be to overrule several decisions which I have cited denying the application of that doctrine as to felonies committed either by force or fraud. A man writes a letter directing another to commit a robbery

The People v. Rathbun.

or a forgery, or utter a forgery, either of which is done in his absence, no one will pretend that the writer is more than an accessory before the fact: whereas, had the object been an assault, he would have been a principal, on his advice being followed. He sends poison into another county, by an innocent agent, to be administered there as a medicine; his arrow is sped, and he is at once guilty of a misdemeanor in his own county; but not of a felony there, though the poison do its office. The law pronounces him present at the place of ministration, by one of those fictions, without which there would be a failure of justice; for if he be not holden to a trial, no one can be. In that way, one who is out of the state might send into it and administer fatal poison with impunity to every one concerned; for the innocent agent could not be punished. So of uttering forged paper through the post office. The venue must be laid at the place where the letter is delivered; and the offender cannot be allowed to gainsay the fact that he was present, and himself committed the crime where it is received. The same rule obtains between county and county. That it is fallacious to reason, concerning venue from cases of misdemeanor to those of felony, or *vice versa*, I also refer to what was said by Abbott, Ch. J. in *Rex v. Burdett*, 4 Barn. & Ald. 171 to 175, and the remarks of some other judges in the course of the cause.

One word may be due to *Doctor Hensey's case*. There intercepted letters were held to be overt facts of high treason. 1 Burr. 646, and *Gregg's case* there cited. It would probably have been the same thing had the letters never been mailed; but confined to the prisoner's custody. *Scribere est agere* is a true saying, though it was misapplied in *Sidney's case*. Foster, 198, Dublin ed. of 1791. Such evidence is admitted on the *peculiar doctrines of high treason*, wherein there are no accessories any more than in misdemeanors. The very intent to commit treason is many times actual treason. Marcy. J. in *People v. Mather*, 4 Wend. 259, 260. 1 Chit. Cr. Law, 261, Am. ed. of 1836. A letter indicating the intent, and connected with the prosecution of a treasonable purpose, is clearly evidence, therefore,

The People v. Rathbun.

of the crime itself; and, if mailed, it is plainly an overt act. Foster, before cited. It does not follow that a like overt act, tending to the commission of a felony, is in itself the felony. I have already cited several decisions to the contrary, in the very case of uttering forged paper.

The rule of the common law, that where a felony is begun in one county and consummated in another, it cannot be indicted in either, but the people must be thrown back upon an indictment as for a mere misdemeanor in each county, 1 Chit. Cr. Law, 177. Am. ed. of 1836, was not much insisted on at the bar. It seems never to have been applicable to the case of a man in one county committing a felony in another through the medium of an innocent agent. Chitty lays down the rule, on the authority of *Girdwood's case*, before cited, thus: "Where a person, by means of an innocent agent, procures a felony to be done in another county, he may be indicted there, though not personally present. Thus, in case of a threatening letter, sent by the hands of a person innocent of its contents, the defendant may be indicted in the place where the letter was received." 1 Chit. Cr. Law, 190. The rule is I think well sustained both by authority and principle. It is, moreover, directly applicable to the case at bar.

Did the court below err in refusing to appoint triors of the impartiality of *Grey*, the juror? He was regularly challenged by the prisoner's counsel as not being impartial, and triors demanded. These were denied, on the ground that they had been waived by the examination before the court without asking for triors, and that this had made the court triors. The correctness of the decision depends entirely on the construction which is to be put upon the proposition of the court in the outset; which was, that either party had a right to triors *on the question of indifferency*; but, *if this were not insisted on*, it would be more convenient and perhaps desirable that each should be sworn to answer *whether he had formed and expressed an opinion*. No objection was made; this course was pursued with all the jurors, *Grey* inclusive, and afterwards, as to him, triors were notwithstanding demanded. That the counsel, and the

The People v. Rathbun.

prisoner through them, assented to the proposition made by the court, there can be no doubt; and it was carried into full effect in the case of Grey himself. The court had said, "If you do not insist on triors of *indifferency*, it will be more convenient and desirable that the juror be sworn as to his having formed and expressed an opinion." On his being called, he was so sworn and interrogated and answered upon the point of *indifferency*. I understand the court as having proposed this oath and examination before them, by way of substitute for the regular trial of a challenge to the *favor*, which is synonymous with *indifferency*, the word used. It is said a contrary exposition is derivable from the form of the oath proposed. True, the only ground covered by the oath was the having formed and expressed an opinion, which is clearly a principal cause. *The People v. Vermilyea*, 7 Cowen, 108, 121. *The same v. Mather*, 4 Wendell, 229, 241. The better opinion, I think, as collectable from these cases is, that the merely forming without expressing an opinion is a principal cause. The oath, therefore, was not broad enough to elicit the grounds of a challenge to the favor. A juror may be quite partial, and liable to challenge without principal cause. But incidentally mentioning the form of the oath was not intended to qualify the proposition as to the *tribunal* before whom the trial should be had. This *tribunal* was changed by consent. The court was evidently intended as the triors of all challenges; and if the prisoner desired a change in the form of the oath, his counsel should have specifically requested it, and if refused, put his exception on that ground.

The law allows triors for the benefit of the prisoner, or the people. Either may waive it. *Quilibet protest renunciare pro se introducto*, is a maxim of universal application. The prisoner may even waive his right to a trial at the hands of a jury on the merits, by pleading guilty. Having this power, no one will pretend that he cannot consent to any thing else. He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court. His power to agree that the court shall act as triors of a challenge, which may be implied from the

The People v. Rathbun.

course that he and his counsel take in respect to the mode of trial, was held in *The People v. Mather*, 4 Wendell, 229, 245. A man cannot legally be indicted and tried as accessory to a felony till the principal be convicted. Such a trial is contrary to an ancient and fundamental rule of law. Yet, says Lord Coke, if he go to trial without insisting on the objection, he shall be holden to have waived it. To this he expressly applies the just maxim cited, *Quilibet, &c.* 2 Inst. 183.

It was intimated in argument, though not much insisted on, that even if counsel had consented to one mode of trial, they might still revoke such consent, and stand upon their former legal rights. To that proposition I cannot assent, even in respect to a trial for felony. The principle is the same as that which binds in civil cases. Any agreement deliberately made, any plain assent, express or implied, in respect to the orderly conduct of a suit, or even an agreement to admit a material fact upon the trial, cannot be revoked at the pleasure of the party. In the business courts, such agreements are so common, and therefore so apt to be forgotten or misunderstood, that they are generally required by rule to be put in writing. The court for the correction of errors, however, where there is no such rule, hold an oral agreement binding. *Chamberlain v. Fitch*, 2 Cowen, 243, 245. Agreements in the courts of oyer and terminer stand, I presume, generally upon the same footing. A prisoner on trial there who defends by counsel, and silently acquiesces in what they agree to, is bound the same as any other principal by the act of his agent.

The courts specifically enforce agreements made in respect to the course of the cause, by persons properly authorized. They do not allow the party to violate a stipulation and put his antagonist to an action. What ought to be done, they will consider either as having been done, or summarily enforce its execution by process of contempt. Where an attorney agreed at the trial to release the interest of a witness, who was therefore sworn, on motion for a new trial the court said they would hold him to have been actually discharged, inasmuch as he might compel the attorney to

The People v. Rathbun.

execute his agreement. *Heming v. English*, 6 Carr. & Payne, 542. 1 Cr., Mee. & Rosc. 568, and 5 Tyrwh. 185. In *Davis v. Burton*, 4 Carr. & Payne, 166, the defendant's attorney, by consent of the defendant, having orally agreed, at a private interview with the plaintiff's attorney, to admit certain facts on the trial, the court, upon the cause coming on and on oral proof of the agreement, held the defendant specifically to perform it, by taking the facts as actually admitted at the trial.

I will not deny that agreements may be thus enforced in a criminal case. Suppose a prisoner to declare on full advice that he will plead guilty, on which the prosecutor's witnesses are all dismissed; might not the court order the plea entered as if the same consequence had been produced in a civil cause on an attorney stipulating to give a cognovit? All this sounds harsh, and no court would enforce a stipulation to plead guilty, unless in a case where they plainly saw that the object of the prisoner was to defraud the course of justice. Agreements to waive his personal rights ought not to be enforced except in such cases, though the right of the court may be exercised to the same extent as in civil causes. *The People v. Mather*, 4 Wend. 229, 245, 246, was referred to as a case in which the accused had been allowed to revoke his agreement. He had stipulated that every juror called should be considered as challenged by each side. The juror examined appeared to be biased against the accused, who was allowed to revoke his side of the agreement, that is, waive his challenge. The court put his right on the general ground to which I have before adverted, that a party may always waive an advantage to himself. The rule has no application where he is seeking to frustrate an agreement made for the benefit of the prosecution. But in the case at bar, the agreement of the prisoner when he sought to revoke it by demanding the ordinary triors, had been executed. The juror had been put upon his trial before the court, and it did not lie with the prisoner to revoke it at that stage, any more than if the trial had terminated, and the juror had been sworn and taken his place in the box. Nothing indeed appears, in the instance before us, which would

The People v. Rathbun.

have seriously affected the interests of justice, had the court given way, but the principle put was convenience. The delay arising from a formal trial for each juror was doubtless alluded to, which is, to be sure, a mere inconvenience. But it is sometimes an harrassing and vexatious, not to say a dangerous inconvenience even for the prisoner. A jury fatigued by delay cannot well appreciate his defence. The attorney general had waived the same right on his part, upon the same reason, and the formation of the jury had progressed upon both sides. Had the court given way to one side, justice would have demanded the same thing for the other; and thus perhaps the jury, so far as it was formed, might have been withdrawn, and a new jury throughout placed in the box. The prisoner had but to intimate his desire to have triors, in reply to the suggestion of the court, when his right would, no doubt, have at once been recognized. I do not deny its importance; and the court will allow and even advise him to recall any improvident concession which is apparently prejudicial to his rights. They will do so on the mere suggestion of counsel that the concession was prejudicial; but not where injury is evidently out of question on the side of the prisoner, while the prosecution may sustain a serious inconvenience. On the whole, I am entirely satisfied that the challenge was legally disposed of.

It struck me as doubtful, on the argument, and I so mentioned at the time, whether a bill of exceptions would lie for refusing triors; and therefore as questionable, whether the challenge and the proceedings upon it were properly before us. The doubt may have been unfounded. The statute allowing a bill of exceptions in criminal cases makes it applicable to the same extent as it was in a civil cause. 2 R. S. 616, 2d ed. § 21. There a bill of exceptions was confined to some point of law arising at the trial, which could not be made apparent in a course of regular entry on the record. It was, therefore, denied to be applicable in *Ex parte Vermilyea*, 6 Cowen, 557, to a challenge for principal cause, which had been raised, debated and overruled as insufficient. The reason given was, that such challenge should be entered on the record as if it had been demurred to, and in the form

The People v. Rathbon.

of a demurrer, with a judgment rendered. A challenge for principal cause is also entered of record where it is tried and a verdict rendered by triors, as may be seen in 1 Trials per Pais, 211, 212, ed. of 1766. Yet I find it said in several books, that an exception may be taken where a point of law arises in respect to a challenge. It was so said expressly in *Rex v. The City of Worcester*, Skin. 101, if the judge overrule the challenge upon debate without demurrer. The reason given is, because the matter does not appear by entry upon the record. It is also said in Bull. N. P. 316, ed. of 1788, that a bill of exceptions lies upon some point of law either in admitting or denying a challenge. Buller cites what was said in *Bridgeman v. Holt and others*, Show. Parl. Cas. 120, which was but an argument of counsel before the lords. However, he is himself an authority; and perhaps it accords best with the practice to allow a bill of exceptions on any point of law decided by the court respecting a challenge, which does not appear on the record. For this purpose, the decision in respect to the challenge may be deemed parcel of the proceedings of the trial. The statute of Westm. Edw. 1, ch. 31, is that when a man impleaded before any of the justices doth allege an exception, it shall be allowed. In terms it extends to matter of exception respecting a challenge as well as any other. On the whole, it certainly cannot be denied on authority, and perhaps not on principle, that the question respecting the challenge comes up in proper form. It certainly was a very proper subject for examination in some way, which can hardly be said of all the matters in the bill.

The bill seeks, with quite too much industry, to draw the whole of the questions, both of fact and of law, from the court below and present them here. A great deal of circumstantial evidence was adduced on both sides, and the admission of all that was introduced on the side of the prosecution, as far as it could be reduced to subdivisions, was excepted to either for incompetency or insufficiency. Again; the intimations or directions of the judge, that other parts were or were not material, and especially that they tended to support or repel certain conclusions, were excepted to,

The People v. Rathbun.

whenever such intimations or directions were adverse to the prisoner. Again ; the judge was requested by the prisoner's counsel to charge whether certain conclusions arose from certain sets of facts or the testimony of certain witnesses, in favor of the prisoner ; and on his declining so to do, or charging unsatisfactorily to the prisoner's counsel, exceptions were interposed. Some exceptions were irrelevant in supposing matters to have been in the charge, which do not appear there. The exception returned as taken *after* the trial and verdict, because the court below refused to stay the proceedings, most clearly should not have been inserted in the bill ; and we hope we shall not have occasion to repeat that exceptions cannot be taken in respect to any of the proceedings *before* or *after* the trial. See *The People v. Dalton*, 16 Wendell, 581, 583, 4,

Many of the exceptions were so frivolous, that the counsel who procured their original insertion omitted them in framing the points for the argument at bar. He raised, however, 26 points for our consideration, out of the multitude and variety contained in the bill ; and a great part of the business of the able counsel, who finally appeared on the argument, was devoted to abandoning them one after another, till they came down to three, which certainly deserved consideration ; two of them presenting questions of a good deal of nicety. The attorney general, in his reply, read thirty-five of the points presented by the bill, and remarked, I am sorry to say, not without a cause, that exceptions to the admission of testimony had been multiplied there in proportion to its obvious propriety and admissibility. The counsel whose duty it was to draw up and attend the settlement of the bill, should not have insisted on the insertion of those exceptions, which he must, on reflection, have seen, were obviously unfounded, or irrelevant. We need not say the interests of his client did not demand it. The fear is that such a practice may not only obscure the presentation of strong points in the bill, and which the counsel and the court below may feel desirous to put in the best shape for a review ; but detract from their final consideration. The attention of all must be drawn more or less to

The People v. Rathbun.

immaterial matters ; that attention which should be reserved for things of real moment.

I refer again to the doctrine laid down by Mr. Justice Nelson in *The People v. Haynes*, 11 Wendell, 561, 2, to which we mean to adhere. Allow me to add, that it is never the office of a bill of exceptions to draw in question the sufficiency of the whole or any part of the evidence in a cause unless a direction be given upon it, or a decision made in respect to it, as matter of law. *Willard v. Warren*, 17 Wend. 257, 260: Opinions of the judge upon its force and effect, whether they be given as to the whole or only certain parts of the evidence, are to be taken as merely advisory, if the cause be finally submitted to the jury. That he overrated its strength against the excepting party, or came short of its strength for him, so long as he treated it as of a merely persuasive character, can no more be settled on a bill of exceptions, than that the jury found against its weight. A great majority of the questions litigated in the progress of the trial depended for their solution upon circumstantial evidence. It is the business of the respective counsel, in such a case, to insist by way of argument to the jury, that certain facts will or will not warrant a given conclusion. He seeks to strengthen or diminish their force, when standing by themselves ; and thence proceeds to consider their influence when regarded in connection with all the other testimony in the cause. In this proceeding there is commonly a good deal of collision between counsel. The judge is called to notice the points of difference, or such as he deems material ; and he does so in his charge to the jury, with whom the decision is left ; and which must in the nature of things be final. In short, the jury are the tribunal to correct the errors, in point of fact, both of the judge and counsel. It cannot be done by writ of error.

I admit that error lies where testimony is received which appears to have been plainly irrelevant. But it will at once occur to every one accustomed to trials upon circumstantial evidence, how extremely difficult it is to establish a case of irrelevancy. The counsel on either side have a right to announce, in opening, or by way of proposition in the course

The People v. Rathbun.

of the cause, that they will prove certain facts which are material to make out their case or any part of it; and the very announcement makes all those facts material, for the time being. They continue to be deemed material, until the judge finds the proofs are so far short of the proposition, that it is not fit to go to the jury. If the proposition be, in the judge's opinion, made out in a stronger or weaker sense, by all or any of the consecutive proofs which are produced, it goes to the jury. Propositions of this kind multiply in the course of the cause, and in the result are continually calling out evidence to discredit or corroborate witnesses, to fix dates, and correct inaccuracies of various kinds. Circumstances, though remote and of doubtful bearing, are receivable for the consideration of the jury; and a very wide scope is often thrown open for inquiries which, at first, would have been unintelligible. In this manner, the road of evidence in the case at bar seems to have gradually widened to a very large field of inquiry. It was sought to show that a system of forgery had been prosecuted by the prisoner against a whole community, and for a while with such success, that he was enabled, on the credit which it brought him, to sustain an immense business. Of that system, it was contended, the particular note in question with the eleven forged endorsements made a part; the prisoner's counsel strenuously contending, among other things, that however extensive the forgeries, his business was so much more extensive, and so little under his own eye, especially in its financial departments, that the forgeries, if any, had been volunteered by agents without his observing the fact. Such an extraordinary defence, warranted an inquiry into his whole business, and all the correspondence connected with it. His very habits of thought and action were entered upon, through questions put by his counsel. And he still persevered, in the face of eight endorsers swearing to the forgery, and confirmed by numerous circumstances, in denying that any forgery had ever been committed. He sought by cross-examination in respect to their connection with him as real endorsers in various cases, to confound their memories, to raise discrepancies as to time, the char-

The People v. Rathbun.

acter of handwriting, and other collateral matters. He showed that several of them were his active enemies. He sought to contradict them by their conduct and declarations; and to convince the jury that they swore falsely. But in a long career of continued attempts at impeachment, he was unable to call a single witness from among a large community, who would deny that he believed the endorsements or any one of them to be forged; a community well acquainted with the individuals whose names were alleged to be forged; most of whom being business men, and their handwriting extensively known at Buffalo. Yet because the judge mentioned to the jury this weak point in the prisoner's case, and told them it was a circumstance which strengthened the proof of the forgery, an exception was taken, and even persevered in to the bar; and one of the counsel made a point, that the judge's opinion should not be given to the jury—that such negative evidence, or indeed any other, tended strongly to complete the proof of the forgery. But see per Best, J. in *Rex v. Burdett*, 4 Barn. & Ald. 121, *et seq.* and Holroyd, J. *id.* 141. Whereas, it is important in these circumstantial cases above all others, that the judge, who is a man of legal knowledge, and great experience in trials, should go through with the proofs in his charge; separating the chaff from the grain; and pointing out to the jury, as far as the imperfection of human language will enable him to do, the individual, the relative and collective weight of those proofs which are material. In omitting to do this, he would be guilty of a great neglect of duty. He is, in general, more collected and calm, and less open to the influence of popular sentiment than the jury; and in many cases, miserable would be the condition of prisoners, if the power which is questioned should be denied. How many innocent men, already doomed by public opinion, have been saved from the scaffold, by the firm and bold opinion of the judge, which seeks to avoid every thing extraneous, and base itself upon the law and the evidence; the *law* which commands him to act not only as its just, but its *humane* minister. It is equally important to the public, that he should frankly give his opinion to the jury

The People v. Rathbun.

upon the evidence which bears against the prisoner. Excluded personally from the concerns of commercial life, he is less interested in a severe pursuit of the man whose crime has struck at its existence, than perhaps any jury that can be impaneled ; while the tenure of his office was intended to place him beyond the attacks of political power, on the pretence that he may have been too lenient in the conduct of state prosecutions. He is, therefore, the safest possible instructor of the jury, both as to the law and the evidence. Indeed the act of estimating the weight of the latter, is but an application of the law to the proofs. An attempt to test the accuracy of such estimate by a bill of exceptions, must be attended with the want of many things before the judge and jury at the trial, which can never be presented by a bill. Having the witnesses and original evidence before him and the jury, with all the requisite explanations and other means of elucidation which attend a trial, he is peculiarly fitted to give proper directions. His words and phrases at the trial cannot be measured, and reversed or affirmed, accordingly as they may seem to be a little more or a little less than the paper standard warrants, as made out in a bill of exceptions. It is impossible to present them literally and as a whole with all the matters to which they relate ; and if otherwise, there is no precise legal standard by which they can be tried. For that reason the judge and jury are made the standard. The law confides to them a discretion, as it does in many things, with which a court of error cannot interfere, without a subversion of their power. From this doctrine the just and upright man has less to fear than from any presentation of his case which can be made on paper. Indeed, any remedy at all by bill of exceptions, is very recent ; and to this day it is, I believe, disallowed in most common law countries. The decisions of the court having original jurisdiction, both as to law and fact, are there absolutely final ; and were so for centuries under our own system. Not even a new trial could be granted, on an erroneous conviction of any crime above the degree of misdemeanor. *The People v. Comstock*, 8 Wendell, 549 ; and said in *Rex v. Ball*, Russ. & Ry. Cr. Cas.

 Stewart v. Hawley.

132, 133. The alteration by our statute does not go beyond introducing the bill to the same extent as in civil cases, where the law never has allowed an examination of the facts with a view to their weight in the scale of evidence.

My opinion is, that the judgment of the court below should be affirmed.

Judgment affirmed.

 ALVAN STEWART vs. HAWLEY & BARTHOLOMEW.

Where a magistrate, on complaint of a violation of the statute for the *observance of Sunday*, issued a warrant, had the person complained of arrested, and imposed a fine upon him, "*it was held* that he was *not liable in an action of trespass*, although he might have *misjudged* as to the facts alleged being an offence within the meaning of the statute. The *complaint* here was that the party, "on the first day of the week called *Sunday*, circulated a memorial to the legislature" without stating the purport or object of the paper circulated.

So it was also held, that the *constable* executing the warrant was not liable in trespass.

THIS was an action of *trespass, assault, battery and false imprisonment*, tried at the Oneida circuit in April, 1839, before the Hon. PHILO GRIDLEY, one of the circuit judges.

At a public meeting on the *Sabbath*, the plaintiff presented an *anti-slavery memorial* for signatures, to be forwarded to the legislature of this state, praying their interference on the subject of slavery. *Bartholomew*, one of the defendants in this cause, thereupon made a complaint in writing, verified by his oath, to *Hawley*, the other defendant, who was a justice of the peace, that the plaintiff, "on the 15th day of July instant, being the first day of the week called *Sunday*, *personally engaged* at Augusta aforesaid in *circulating a memorial to the legislature*, at its next session, of the state of New York, contrary to the statute in such case made and provided." The justice issued a *warrant* reciting the complaint as made to him, directed to any constable of the county of Oneida, commanding the plaintiff to

Stewart v. Hawley.

be apprehended and brought before him. The warrant was delivered to *Bartholomew*, who was a constable, and proceeded to a congregational church at *Oriskany Falls*, where a meeting of the Oneida County Anti-slavery Society was holden, and interrupted the plaintiff whilst addressing the meeting, and told him he had a warrant for him *for breaking the Sabbath*. The plaintiff yielded to the arrest, and was taken by the constable before the justice, where the matter was investigated, and the plaintiff *fined one dollar*. The plaintiff offered to prove that Bartholomew abused him at the door of the church when he made the arrest, by language and in the manner of making the arrest; that he threatened to bind him if he spoke a saucy word on the way to the residence of the justice; that he was actually carried there by force; "and that the constable had boasted that he had had a hell of a scrape with the plaintiff, that he intended to have one from the beginning, and had had a good one." The counsel for the defendant objected to such evidence being given, on the ground that the action was *joint*, and there was no offer to implicate the justice in the facts offered to be proved. The judge sustained the objection, and after some further evidence not materially changing the character of the case, directed the plaintiff to be *nonsuited*. The plaintiff asked for a new trial.

A. Stewart, in person, insisted that the justice had no jurisdiction except what was derived from the *complaint*, and it contained nothing which showed a violation of the *act for the observance of Sunday*. It had been pretended that his conduct came within the words of the statute forbidding *servile laboring or working on that day*, 1 R. S. 675, § 70. These, he said, were the only words of the statute under which such a pretence could be made, but who could believe that *circulating a memorial to the legislature* is embraced within those terms. The statute, he contended, has no operation upon any acts except those which it prohibits, and consequently no one is liable to be proceeded against by virtue of it, unless guilty of a palpable violation of its provisions. In support of which proposition, he cited many

 Stewart v. Hawley.

adjudged cases. There was no room, he contended, for the exercise of judgment by the justice, so as to bring him within the protection of the rule of law that a magistrate is not responsible for forming an erroneous judgment. There was no complaint that the statute had been violated; the only complaint was that on *Sunday*, the 15th day of July, he was personally engaged in circulating a memorial to the legislature! for what purpose was not stated; and for aught that the justice knew, it might have been to further the very objects for the promotion of which the act was passed and its penalties created. As to the *constable*, he was utterly without excuse, especially under the proof offered, which as to him and for the purpose of this motion must be considered as having been given. It however should have been received, he insisted, as to *both defendants*; the circumstances of the case being such as would have warranted the jury to have found that the *justice* acted *colore officii*; but at all events, it was proper evidence against the *constable*, against whom alone the jury might have found a verdict, although the action was *joint*.

T. Jenkins, for the defendants.

By the Court, NELSON, Ch. J. Our statute, 1 R. S. 675, § 70, after specifically forbidding several acts and exercises on *Sunday*, adds, "*nor shall there be any servile laboring or working on that day*," &c., and annexes a fine of one dollar for each offence. The 73d section, p. 676, provides that whenever complaint shall be made to any justice, &c., of a violation of the statute, he shall cause the offender to be brought before him, and shall proceed summarily to inquire into the facts, &c., and the conviction shall be final and not the subject of re-examination upon the merits. By the 2 R. S. 706, § 2, whenever any complaint shall be made to a magistrate of a criminal offence, it shall be his duty to examine on oath the complainant, &c. And by § 3, *if it shall appear from such examination that any criminal offence has been committed*, the magistrate shall issue a proper warrant under his hand, with or without seal, *reciting the accusation*,

 Stewart v. Hawley.

&c. It cannot be doubted but that the justice, by means of the *complaint* in this case and the *warrant* issued thereupon, acquired jurisdiction over the *subject matter* and the *person* of the defendant, and that his error, if any, was an error of judgment. He may have misapprehended the true import of the statute, and concluded that the plaintiff fell within the prohibition, when he did not; but no principle of law is better settled than that for such mistake the magistrate is not responsible in an action. 1 Brod. & Bing. 432. *Mills v. Callet*, 6 Bing. 85. 3 Maule & Selw. 411. 8 Wendell, 462. 11 id. 95. 19 id. 61, 62. The case of *Mills v. Callet* is very strong and decisive. The only question, said TINDALL, Ch. J. is whether the magistrate had jurisdiction to investigate and commit. He further remarked, that if a party charged with an offence be brought before a magistrate the officer must exercise a judgment on the case, and is not liable for mere error of judgment. Burrough, J. also observed, that if a magistrate has jurisdiction, he can never be liable for an action of trespass, nor in any form of action for a mere mistake in matter of law; and whether an *occupier* could commit a felony under the statute 7 and 8 G. 4, *on his own premises*, was clearly matter of law. Now here, on the complaint being made the magistrate was bound to entertain it and exercise his judgment; and whether the facts disclosed showed *prima facie* a violation of the *act for the observance of the sabbath*, was certainly a question of law. The section of the statute is not very explicit in respect to the clause already referred to, and might well embarrass more skilful administrators of the law, than many of our justices of the peace. I cannot agree with the plaintiff, that the facts are so barren as not to lay the foundation for jurisdiction, or that the decision was so gross as to afford evidence *per se* of the influence of bad motives. On the contrary I am free to say, with TINDALL, Ch. J. in *Mills v. Callet*, that it would be most dangerous if magistrates were held to be liable in such cases.

Great stress was laid on the insufficiency of the recitals in the *complaint* and *warrant*. As to the former it was not necessary that it should be put in writing; an oral examina-

Stewart v. Hawley.

tion would have been sufficient, 2 R. S. 706, § 2; and as to the latter, the recital of the *offence* might be very brief. The object of the recital is to enable the defendant to see whether the offence be bailable, so that he may appear prepared with bail or with any defence that is admissible on the return of the warrant. 1 Chit. Cr. Law, 33, 34. Hawk. B. 2, ch. 13, § 25. The better opinion at common law appears to be, that a recital of the *offence* in the warrant is not essential. 9 Wendell, 62. 19 id. 56, and cases above cited. Even in the case of a *mittimus*, where a brief recital is required, the omission does not render it void, so as to subject the jailer or other officer to an action of false imprisonment, or excuse him for an escape. 1 Chit. Cr. Law, 93. I do not, however, put the decision upon the sufficiency of the recitals in the *complaint* or *warrant*, any farther than this: that they present a case within the jurisdiction of the justice, and which called for the exercise of his judicial functions; and if so, though he may have erred, he is not liable.

If we are right in the conclusion respecting the justice, it necessarily follows that the warrant was a protection to the officer; for if there was matter enough to justify the proceeding of the justice, it would of course justify the officer. Indeed, if there had been no recital of the offence in the warrant, the constable would have been protected; for to subject him to responsibility in this action, it must be shown not merely that the magistrate had no jurisdiction to issue the process, but that it so appeared on the face of the process.

The judge was also right in excluding the evidence of the abuse of the plaintiff in the arrest, and whilst the officer was carrying the plaintiff before the magistrate. This was taking ground to sustain the action against the officer in respect to which the justice was in no way implicated. Assuming what we are disposed to hold in the case, that the process afforded a justification to both justice and officer for the arrest, the only object or legal effect of this evidence was to charge the latter for abuse in the execution of the process. I admit, if the plaintiff had elected to discharge the justice, he might have entitled himself to the evidence, and possibly have sustained the action; but as the case

Cunningham v. Hudson River Bank.

stands, it was claimed as proper against both defendants, and so understood by the judge. This is obvious from the ground taken by the counsel against its admissibility, and upon which it was excluded.

Though I regret that the officer cannot be reached in this action for his abusive conduct towards the plaintiff, I am satisfied the case was disposed of at the circuit upon settled principles of law.

New trial denied.

CUNNINGHAM vs. THE HUDSON RIVER BANK.

Proof of the *hand-writing* of a party to negotiable paper—what will be deemed sufficient.

The mere fact that *checks* upon one bank had been passed to the credit of another, which had discounted and transmitted them to a correspondent for collection, is not enough to support the testimony of a witness who swears to the *hand-writing* of the drawer of a check, of which he has no knowledge other than that derived from its similarity to the signatures of the checks paid.

It seems, that it is not enough to receive proof of *hand-writing*, that the witness has received letters from the party sought to be charged, upon which he has acted, unless such acts were subsequently recognized or ratified by the writer of the letters.

ERROR from the superior court of the city of New York. The action below was brought by *the bank* against *Cunningham* to recover the amount of a check for \$146, which it was alleged had been drawn by him on the *Greenwich Bank, N. Y.*, and negotiated to the plaintiffs, and which had been lost. 2 R. S. 406, § 75, 76. *Coffin*, the plaintiffs' cashier, testified that on or about the 20th June, 1835, the plaintiffs paid a check purporting to be drawn by *S. A. Cunningham*, for \$146, on the *Greenwich Bank*, in New York; that he enclosed the check in a letter to *G. A. Worth*, cashier of the *City Bank* in New York; and gave the package to Capt. Seymour of the steamboat *De Witt Clinton*—there being no mail on that day. He further testified that he did not know the defendant, and never saw him write. The check was payable to bearer; did not

Cunningham v. Hudson River Bank.

know from whom the check was received; did not pay it himself, but received it from Mr. *Annable*, the paying teller. He further testified, that from April to June, the plaintiffs paid some eight or ten checks of a like kind, which had been sent to the *City Bank* and paid. This one was in the same hand-writing with the others, and was the last check with that signature which the plaintiffs received. The checks were sent to the *City Bank* for collection, and were by that bank carried to the plaintiffs' credit.

The fact that the check in question never reached the *City Bank*, and that the package containing it was lost, was sufficiently proved. *G. A. Worth*, cashier of the *City Bank*, testified that he had no recollection of ever having received any checks drawn by *S. A. Cunningham*; did not remember any such ever passing through the bank; they should have passed through his hands in every instance.

On this evidence the defendant moved for a nonsuit, because the evidence of his hand-writing was insufficient to go to the jury and because there was no evidence that he ever gave any check on the Greenwich Bank, or had ever kept an account there. The motion for a nonsuit was overruled, and the defendant excepted. The judge charged the jury, that if they were satisfied upon the evidence that the check in question had been drawn by the defendant, had been taken and paid by the plaintiffs, and had been lost, the plaintiffs were entitled to recover. The defendant excepted to the charge, and the verdict and judgment having passed against him, he now brings error.

J. R. Whiting, for plaintiff in error.

D. D. Field, for the defendants in error.

By the court, *BRONSON, J.* A witness must, in some way, have acquired a knowledge of the general character of the party's hand-writing, before he can be qualified to testify on that subject. If he has not seen the party write, he must have seen genuine specimens of his hand-writing; and the fact that they were genuine, must be proved. It is not

Cunningham v. Hudson River Bank.

enough that they purport to come from the person whose hand-writing is in question. The cases of *Titford v. Knott*, 2 Johns. Cas. 211, *Johnson v. Daverne*, 19 Johns. R. 134, and *Harrington v. Fry*, Ryan & M. 90, to which the counsel for the plaintiffs below, referred, only show that the authenticity of the specimens may be established by presumptive, as well as by direct evidence; not that the fact of authenticity can be presumed without proof. When letters are directed to a particular person on business, and answers are received in due course, a fair inference arises that the answers were written by the person from whom they purport to come; and if a man has deliberately admitted his liability upon instruments purporting to bind him, as by paying notes or bills on which his name appears, it is but reasonable to presume that the signatures to those instruments were in his hand-writing. Other cases might be mentioned where the circumstances will well warrant the inference of authenticity, although there may be no direct evidence to that effect. But in some way, the fact that the specimens are genuine, must be satisfactorily proved.

The only case I have met with which seems to conflict with this position is, that of *Tharpe v. Gisburne*; 2 Car. & Payne, 21. The case, as it is briefly and, I think, imperfectly stated by the reporters, was this: "The defendant's attorney was called to prove his signature to a paper; he said he had never seen the defendant write, but that he believed this instrument to be his hand-writing from having received letters from him, upon which he had acted;" and *Best*, Ch. J. held this sufficient. It must, I think, have appeared that the defendant had in some way acknowledged that the letters which the witness had received were written by him. They probably related to the defence of the suit, or to some other matter upon which the witness had acted in his character of attorney; and if the defendant had not, in terms, admitted the authenticity of the letters, there may have been such a ratification of what had been done in pursuance of them, as to leave no room for doubt that he was the author. The fact stated by the reporters, that the witness had *acted upon the letters*, unless it was followed

Cunningham v. Hudson River Bank.

up by other evidence, was wholly unimportant. It only proved that the witness believed the letters genuine; not that they were so in fact.

In a note to the case of *Tharpe v. Gisburne*, it is said, that, "now, the universal practice of the lord chief justices at the sittings is, if a witness states that he has received letters purporting to come from a party, *and has acted on those letters*, to ask him whether he believes the paper he is called to prove is of that party's hand-writing." If any such practice has been adopted at *nisi prius*, in England, it is of recent origin; and I am not prepared to follow it. Standing alone the fact that the witness *has acted on the letters*, has no tendency to prove them genuine. It only proves, and that merely by inference, that the witness believed the letters authentic. His *belief* is of no importance, unless it is founded upon some good reason; such a reason as will satisfy the court and jury as well as the witness.

Although the fact that the witness has acted on the letters, when standing alone, is of no importance, it may be of great value in a chain of circumstantial evidence. The acts done in pursuance of the letters may be followed by such acts of approval or acknowledgment on the part of the supposed author as can only be accounted for on the supposition that he was in truth the writer of the letters; and there can be no doubt that in this way, as well as by a direct admission, the fact of authenticity may be satisfactorily established.

In the case at bar, I am unable to discover any satisfactory evidence that the checks from which alone the witness derived his knowledge of the hand-writing, were drawn by the defendant. The witness undoubtedly thought them genuine, for otherwise he would not have taken them. But that fact alone, will not answer. The only further evidence upon this point was, that the checks had been sent to the *City Bank* for collection, and were by that bank carried to the credit of the plaintiffs. This fact adds little or no force to what had been proved before. It only shows that the teller or other officer of the city bank gave credit to the checks. And that he, as well as the plaintiff's cashier,

Cunningham v. Hudson River Bank.

thought them genuine. But the belief of two, or even ten witnesses upon such a question is no better than the belief of one. The checks were drawn on the *Greenwich*, not on the *City* bank, and there was no proof that they had ever been paid, or presented for payment; nor that the defendant had ever kept an account with, or drawn a check on the Greenwich bank.

But it is said in the ordinary course of business the City bank would present the checks at the Greenwich bank for payment. If we presume the presentment, we must still make two further inferences before we reach the necessary conclusion that the defendant had admitted his liability on the checks. We must presume payment by the Greenwich bank, and then, that the defendant had ratified the payment. This would be building presumption on presumption, and that too without any very good reason for believing that we were approximating the truth. For, unless we assume at the outset that the checks were genuine, which is the very matter in dispute, the fact of presentment affords no ground whatever for presuming that they were paid. And again, if presentment to, and payment by the bank had both been proved, it would not follow that the defendant had ratified the payment, or in any way admitted that it was made on his account.

It is worthy of remark, that although the cause was tried in the city of New York, no officer of the Greenwich bank was called as a witness. The plaintiffs resort to a string of presumptions to make out their case, when they might in a few minutes, and without any inconvenience to any one, have laid before the jury all the facts in relation to the supposed payment of the checks.

The proof on which the plaintiffs rested their case is open to a further remark. The checks from which the witness derived his knowledge of the hand writing, as well as that on which the action was brought, may either have been *forged* with intent to defraud the defendant, or they may have been *genuine* checks drawn by some other person of the name of Cunningham. The witness had never seen the defendant write, and did not know him. The checks were

Cunningham v. Hudson River Bank.

signed "S. A. Cunningham," and there was no proof either that the defendant had ever subscribed his name in that manner, or that there was not some other person in the city of New York who did so sign his name. The initial letter "S." may as well stand for *Solomon* as for *Samuel*; but should we assume that in these checks the letter stands for *Samuel*, there may be other men in the city of the same name with the defendant. In *Harrington v. Fry, Ryan & Co.* 90, the witness who proved the hand-writing, said he had never seen the defendant, but had corresponded with a *Samuel Fry of Plymouth Dock*; that he had so addressed his letters, and had received answers from him; and it was from these letters that he derived his knowledge of the hand-writing. And it was thought necessary to call another witness to prove that *the defendant, Samuel Fry*, lived at Plymouth Dock, and that there was *no other person of that name living at Plymouth Dock* within the knowledge of the witness. It was still objected that there might be another person of the same name at Plymouth Dock, but Best, Ch. J. said, it was evidence for the jury to consider whether the letters mentioned by the witness were not written by the defendant.

I think the evidence was not sufficient to carry the cause to the jury. The plaintiffs should have been nonsuited.

Judgment reversed.

The People v. Morrell.

THE PEOPLE vs. ABRAHAM MORRELL.

Where a county is divided and two separate and distinct counties formed out of it by act of the legislature, to one of which a new name is given, whilst the other it is declared *shall be and remain* a separate and distinct county *by the name of the county as it existed previous to the division*, the judges of the county courts appointed previous to the division who happen to reside in that portion of the territory distinguished as a county with a new name, under the operation of the act requiring judges of county courts to reside within the county for which they are appointed lose their offices, and are no longer competent to act under their commissions; whilst those of the judges who happen to reside in the portion of the territory which retains the *original name*, continue in office until the expiration of the term for which they were originally appointed.

It seems that it would have been competent to the legislature, by *express enactment*, to have continued the judges whose residence happened to be in the new county, until the expiration of their constitutional term of office; but that by remaining silent, the office is gone.

A county may be divided by the legislature into two or more counties by a mere majority vote; it is not necessary that a bill for such purpose should receive the assent of *two-thirds* of all the members.

INFORMATION in the nature of a *quo warranto*. On the first day of May, 1839, the attorney general filed the information in this case, charging the defendant with having usurped the office of *first judge* of the county of Fulton, and having used and exercised that office since the first day of January, 1839, without lawful authority. The defendant pleaded that on the second day of February, 1838, he was duly appointed first judge of the county of Montgomery, for the term prescribed by the constitution, (5 years,) and within the time required by law, took and subscribed the oath of office; that on the eighteenth day of April, 1838, an act was passed by the legislature of this state, entitled "An act to erect a new county from a part of the county of Montgomery, by the name of Fulton;" that at the time of his appointment as first judge of Montgomery, he was an *inhabitant* and *resident* of the town of Johnston, then in the county of Montgomery, and still remains a *resident* of that town; that by the act above referred to the town of Johnstown is made to form a part of the county of Fulton. By means of which premises

The People v. Morrell.

he, the defendant, was and *is first judge of the county of Fulton*; and by that warrant and authority uses and exercises the office, &c. To this plea the attorney general demurred.

Willis Hall, (Attorney General,) for the people, insisted that by the "act to erect a *new county* from a part of the county of Montgomery, by the name of *Fulton*," a separate and distinct body corporate and politic was created, as much unconnected with Montgomery as with any other county in the state; and that after the first day of January, 1839, when the act went into full effect, the defendant had no authority to hold the office or perform the duties of *first judge* of the county of *Fulton*. He could exercise the duties of his office *only by virtue of his commission*, which authorized him to act, not as first judge of *Fulton*, but as first judge of *Montgomery*. The latter county, as it existed at the time of his appointment, was no longer to be found; it had been divided into two separate and distinct counties by the legislature, who possessed the power to make such division, and had exercised the right since 1691, when the then province of New York was divided into *ten* counties. Besides, the right of the legislature to make such divisions is expressly recognized by art. 1, § 6 and 7, of the constitution. *Fulton*, he insisted, was a *new county*, whilst *Montgomery* remained the identical county, it was previous to the passage of the law, with the exception of a diminution of its territory, and in support of this proposition adverted to the *title of the act* and to various of its provisions. The act, he observed, did not directly designate the defendant first judge of the new county, nor could it do so *indirectly*. The claim of the defendant necessarily assumes two propositions: 1. That by such act of the legislature he was *removed* from the office of first judge of *Montgomery*; and 2. That by the act, or by the operation thereof, he became first judge of *Fulton*. The first proposition, for the sake of the argument, he was willing to concede; but claimed its consequences which were: 1. That the act was constitutional and valid; 2. That the act of the legislature requiring judges

The People v. Merrell.

to be *residents* of the county of which they were officers, was also a constitutional and valid act; and 3. That the appointment of the defendant as first judge of Montgomery and his commission under such appointment were annulled. But he denied the second proposition, because the legislature did not possess the constitutional power to appoint the defendant first judge of *Fulton*; the act erecting the county of *Fulton*, grants to it all the rights, privileges and immunities possessed by the other counties of the state, § 1; and the constitution guarantees to every county, judges of its courts, to be appointed by the governor, with the advice and consent of the senate. Art. 4, § 7. If the legislature possessed such power, they had not, he said exercised it in the present case; but, on the contrary, had negatived their right by § 24 of the act, whereby it is enacted that, for all judicial purposes, as it relates to the courts, the counties of *Montgomery* and *Fulton*, should be considered as one county, *until the 31st December next*, after the passing of the act, "and that the present judges of the county of Montgomery" should continue to exercise the duties of their respective offices in the said counties until that day, but no longer. The fact of the defendant happening to reside, when the act was passed, in a portion of what formerly constituted the county of Montgomery, but was now embraced in the county of *Fulton*, did not confer upon the defendant the right to exercise the duties of the office of first judge of *Fulton*; nor was such the understanding of the legislature. By § 23 of the act in question, the legislature directed an election in *Fulton* of a sheriff, clerk, and three coroners, although the *sheriff* of the former county of Montgomery was a resident of that part of the old county which was created into a new county. The opinion also of the executive of the state was in accordance with this view of the question, for he *nominated* the present defendant first judge of *Fulton*; and a *surrogate* was actually appointed, although the former incumbent was a resident of *Fulton*. Besides, on the same day, the present defendant was appointed a master and examiner in chancery, notwithstanding he held unexpired appointments to the same offices for the county of Montgomery.

The People v. Morrell.

The attorney general further insisted, that a *commission* duly signed and under the seal of the state, is essential to the tenure of the office and to the legal discharge of its duties; in support of this proposition he cited 1 R. S. 103, § 17, 20, 21, 22, and *Marbury v. Madison*, 1 Cranch, 137, 173, 145, 156, 157, 158, 159, 160. Finally: he contended that if by any construction the defendant could be deemed to have become first judge of the county of Fulton, on the first day of January, 1839, he had forfeited his office by omitting to take the oath of office within 15 days after the commencement of his term of office. The constitution peremptorily requires that all officers, executive and judicial, shall, before entering on the duties of their respective offices, take and subscribe an oath of office, art. 6, § 1; and this without reference to the mode in which the offices are conferred. Now admitting, for the sake of the argument, that by the operation of the act creating the county of Fulton, the defendant by reason of his former appointment and his residence in the county of Fulton, became first judge of the latter county, it was incumbent upon him to have taken the oath of office within 15 days after the first day of January, 1839, see 1 R. S. 119, § 21, and having omitted to do so, the office became vacant.

C. McVean, for the defendant. It is admitted by the pleadings that the defendant was duly commissioned by the governor, with the consent of the senate, on the 2d February, 1838, as first judge of the county courts of the county of Montgomery; that he took the constitutional oath of office on the 10th of February thereafter; that he was then a resident of Johnstown, and entered upon the discharge of the duties of his office, and that he has continued ever since to reside there and discharge such duties. The constitution, Art. 5, § 6, declares, that "judges of the county courts shall hold their offices for five years." It is not pretended that he has resigned his office, nor forfeited it. Neither has the legislature required him to do any thing as a condition precedent to his retaining his office. The attorney general has not, either in the information or in his

The People v. Morrell.

argument, asserted that the defendant is not now in office in pursuance of his commission. The proposition that he has lost his office, is so flagrantly in violation of his constitutional rights, that it meets no advocate any where. The proposition that he retains his office consistently with his original and continued residence in Johnstown has not been denied, but on the contrary has been affirmed by the different branches of government, in whom rests the appointing power. The position that the defendant is in office, and in office consistently with his residence, is assumed to be undeniable, *because it rests on the constitution*, and every argument assailing it, or not in harmony with it, must be discarded in the consideration of the question in controversy.

The next question is, *over what portion of the original territory* of Montgomery must he exercise the jurisdiction conferred by his office? The attorney general has not ventured to speak to this point, further than to insist that the defendant cannot exercise the jurisdiction of his office in that portion of the territory now included in the bounds of Fulton county. The position that he assumes is, that the present county of Montgomery is the same county that existed at the time of the defendant's appointment, and that Fulton is a *new* county. This is denied. The defendant contends that they are both portions of the old county of Montgomery, and are *both new counties* carved out of the old county, and that there is nothing new about the substance of the one more than the other; and the only difference between them is, that the legislature have thought fit to confer the name which they once jointly possessed on the one, and to give a new name to the other. In favor of the position that *Fulton* is a *new* and *Montgomery* an *old* county, several provisions of the act making the division are referred to as seeming to recognize such a distinction; but upon a careful examination, it will be found that both counties are expressly *created* by the act, and are both created "separate" and "distinct" counties of the respective names given by the act; and in the instances in which there are provisions in regard to Fulton and not to Montgomery, they are those only in which legislation was superfluous, by reason of general laws already enacted applicable to all coun-

The People v. Morrell.

ties. It will be observed, also, that in every instance in which legislation was necessary by reason of both being new counties, and of there being no general statute uniform in its application to all counties, provisions have been made as to each county in the act. For example, take the county courts—the terms in each county are established. In Montgomery, they are in the act prescribed to be held on the second Monday of June, September, December, and March. Now it so happens that the courts were held in Montgomery, before the division, on the same days. Why then this legislation? Was it necessary, or was it superfluous? The attorney general says it was superfluous. The defendant insists it was indispensably necessary. The judgment of the legislature on this point is manifested by the provision itself; it was deemed necessary. It was not in the power of the legislature, by declaration, to make one of these counties *new* and the other *old*, if such were not their real character. In substance, they are two new counties created out of one; and it cannot be that a name can change their essential character; for then a transposition of names would change the character of both, and this would make the shadow efficacious to control, and the substance and essence of the thing a nullity. The division of *Niagara* county affords an illustration of this point, Statutes, sess. of 1821, page 220; one portion was called Niagara and the other Erie. It so happened that the county buildings were in Erie. By referring to that act, the same provisions for the organization of the new Niagara will be found, as in this, for the organization of Fulton, and the same silence in regard to Erie as in this to the new Montgomery; and yet Erie, in that case, succeeded to all the rights and privileges that the new Montgomery has in this. Which county in that case was the new, and which the old? Neither; for in that case, as in this, to give either such a character as is claimed, would lead to absurd consequences, and be in contradiction of *the fact*, having an independent existence from its very nature, that *both are new*. This point has also been decided by the chancellor on appeal from the decrees of the vice chancellor of the eighth circuit. 6 Paige, 639. There,

The People v. Morrell.

school district No. *one*, in the village of Buffalo, had a right to certain compensation from the general government for the destruction of a school house by the enemy during the late war. After the right had accrued and before the money was paid, district No. *one* was divided into districts Nos. 1 and 2. District No. 1 contended, that notwithstanding the division, its corporate indentity existed as before ; that it was the same old district, and that No. 2 was a new corporation ; and so the vice chancellor decided. On appeal, the chancellor reversed this decision, on the ground that the division made them two new corporations.

There is a provision in the constitution of this state which it is submitted has an important bearing upon this point. The constitution, article 1, § 7, provides that " no *new* county shall hereafter be erected, unless its population shall entitle it to a member." If this court decide that one of these counties is a new county and the other an old county, a judicial construction will have been given to the term *new*, (the term used in the constitution,) which will limit the constitutional prohibition accordingly. When a county hereafter is to be divided, the legislature has only to be careful that the county which it declares to be new shall have the requisite population, and as there is no constitutional restraint as to the population of *the old*, it will be a matter of entire indifference what its population may be. Under the license of such a judicial construction the constitution would be practically nullified ; and the legislature could, by observing distinctions, create as many new counties as it pleased, provided all the old counties in name are left *established*. The only remedy against such an infraction of the spirit and intent of the constitution is with the judiciary, and this court will not, in advance, put such a construction upon words against facts as will authorize the legislature, at its pleasure, to violate the instrument intended to restrain legislative action within prescribed boundaries as to the creation of counties.

The 24th section of the act suspends the right of both counties to hold certain courts in either county until the first of January thereafter, and then declares, that for the purposes

The People v. Morrell.

mentioned the two counties shall be considered one county ; the section then declares that the defendant shall be judge of the two "distinct" and "separate counties" created by the act, until the first of January thereafter. The first clause of the section reserved all his powers as to the judicial unity, and the last clause assigned to him the powers of his judgeship by name to the two *new* "separate and distinct counties created and named in the act ; for he is authorized expressly to discharge "the duties" of his office, not in the *one* county of Montgomery as reserved, but "in the said counties of Montgomery and Fulton." The office without its duties is an abstraction, and it is the duties of an officer which constitute an office and are its attributes. He was required by the act to discharge all the duties of the office of first judge of Fulton that pertained to that office in the "distinct" county of Fulton. He was bound, as first judge of that county, to act under the landlord and tenant act, for which purpose that county was as "distinctly" and "separately" organized as St. Lawrence county ; and under which act no judge but a judge of Fulton, as an independently organized county, could have jurisdiction. He was bound, in case of vacancy, to act as surrogate of that county, for it is not pretended that county was not entitled to a "separate" surrogate's court. He was bound, as judge of that county, to hear appeals from the commissioners of highways, to issue attachments, to grant insolvent discharges, and to do all such other acts as judge of that county as were not included in the reservation by which, for certain purposes, the two counties were continued as one county until the first of January. He was then, by the act itself, judge of Fulton county *eo nomine*. All the judges of old Montgomery, without respect to their residence, were made judges of the two new counties for a limited period. On the first of January the defendant ceased to be judge of the new Montgomery, by reason of his non-residence. He was a judge of Fulton on the 31st December, and he was also on the first of January, because he was a resident ; because he had been a judge of that county by law, consistently with his commission ; because it was not in the power of the

The People v. Morrell.

legislature to shorten his term of service; because the legislature affixed that only as the time during which he was to be judge of the *two counties*, and because the general statute requiring residence, by operation of law assigned that county to him after the period had expired in which the judgeship of the two counties was to continue without regard to residence, and excluded him from the judgeship of Montgomery. The general law requires residence—the law creating the division, by express terms, made him a judge for six months of Fulton. The legislature had the power to declare him judge of Fulton under his commission. They did do so, and it made him judge. The legislature had no authority to limit his term to six months; and in a parallel case this court has decided the assignment good, and the limitation bad, as against the constitution. 1 Cowen, 550. 6 id. 642. That such was the intention of the legislature, is manifest from other provisions in the act of division. All the *county officers* elected by the people, whose term is secured by the constitution, were at the time of the division residents of that portion of the territory now included in Montgomery, except one coroner. The act provides for the election of a sheriff, clerk and *three* coroners in Fulton. The legislature acted as if it were a conceded fact that each officer retained his office in the county of his residence, and the will of the legislature, when its power is conceded, ought to prevail. The attorney general denies the competency of the legislature to make the assignment claimed, and insists that the commission and the oath of office, required by the constitution, must *in terms* conform with the power claimed—that the defendant has no commission as judge of Fulton county, and has not taken the oath of office required by the constitution as judge of Fulton, and that he has no right to act as judge there; neither could the legislature confer such right. The right of the legislature to enlarge or diminish the jurisdiction of an officer in commission, both as to subject matter and as to territory, has been uniformly exercised and as uniformly sustained by the courts. Indeed, so far as authority goes it is an unquestioned right. 1 Cowen, 550. 6 id. 642. 19 Wendell, 27. There can be no doubt that the legislature

The People v. Morrell.

could extend the jurisdiction of a judge over twenty counties, without incurring, in a legal sense, the imputation of having legislated him into office.

All the principles contended for by the defendant have been established by legislation and judicial construction. The legislature has provided, that upon the division of a town, or the alteration of the bounds of a town, if more than four justices are thereby put in a town, they shall nevertheless continue to be justices of the town of their residence. 1 R. S. 102. This is an assertion of legislative power clearly in point, admitting that a justice is a town officer. In that case, the legislature were embarrassed by the constitutional restraint as to the number of justices in a town, (an embarrassment that does not exist in relation to judges of a county,) and still the rights vested in an individual by the constitution were held to be the permanent rights. How much clearer is the case of judges which involves no constitutional contradiction? In the cases decided in 1 Cowen, 550, 6 id. 642, the following principles are established: 1. The right of an officer to his office for the constitutional term of his appointment; 2. The power of the legislature to divide towns and counties must be exercised subserviently to the right of office in persons where the tenure is fixed by the constitution; 3. That officers, upon a division of a county, are officers of the county of their residence. These principles applied to this case decide it. It has been asked if Saratoga county, the county of the residence of the judge of the fourth circuit, were set off to the third circuit, and the judge continued to reside in Saratoga, would he be judge of the third circuit, or would he lose his office? The answer to that question would in no manner decide this, as the power of the legislature in regard thereto is not the same. There can be by the constitution but eight circuits, and one judge to each circuit; and that case would present a grave constitutional question which does not exist here, as there are no such impediments. Again, it has been asked, if a town in a county having a judge in it should be annexed to another county with five judges, would that judge continue in office? The legisla-

The People v. Morrell.

ture has the power to place as many judges in a county as it pleases and has exercised that power in the case of justices of the peace, even against another provision of the constitution touching the number in a town ; and where the power is conceded, it must also be conceded that the legislature is bound to exercise it subordinately to the constitution as the usual plea justifying usurpation, necessity, cannot even be suggested. But suppose that judge was first judge, would you have two first judges ? The designation first judge is unknown to the constitution ; it was made by the legislature, and the legislature has the power to regulate and declare how and where he shall exercise the duties of his office ; and what the legislature can do, it is bound to do in support of constitutional rights. If the legislature neglected to do what it could, or shou'd have done, which would stand or which would fall, a statutory incongruity, or that instrument, upon the maintaining of the inviolability of which, in all the departments of government, the whole fabric of our civil liberty rests ? There is no such degeneracy in the times as to require an answer to such a question.

It has been said that the governor appointed a surrogate in *Fulton* where the surrogate of old Montgomery resided ; and that that is a case in point, showing the judgment of the executive. The cases are not parallel. The surrogate is an officer not known to the constitution. The legislature can unmake that which it has made, but is wholly impotent as to that which the constitution has placed above and beyond it. The attorney general has with great industry collected from the executive records numerous instances in which, upon a division of a county, judges in commission received new commissions in the county of their residence, but not a single instance in which an individual in commission has been superseded. This uniformity is the strongest recognition of a right that is questioned that could be presented. The first time the right has been practically denied, is the instance now before the court.

A justice of the peace elected in a town in old *Montgomery*, has, under the laws and decisions of this court, a right to sit as judge of the general sessions of *Fulton*. This

The People v. Morrell.

case is strictly analogous in principle, whether a justice of the peace be considered a town or county officer. The duties of an office define its character. At the time of the adoption of the constitution, the duties of a justice were stated in his commission. He was "a justice assigned to keep the peace in the county, and also to hear and determine divers felonies, trespasses and other misdemeanors in said county perpetrated;" in other words, he was the conservator of the peace, and a judge of the county court. The duties of a justice are the same under an election as under his commission; nor has any law abridged his jurisdiction or changed its character. How can a justice of the peace sit as a judge of a county court? He is a judge as a justice of the peace, *ex vi termini*, notwithstanding the seeming constitutional provision to the contrary, which required judges of the county courts to be appointed by the governor and senate. Are not all his duties in character the same as those of the defendant? Neither of them are the court; they are members of the court, and hold their offices absolutely independent. Both are judges of the same court; have other judicial duties to perform; are local officers, and have their term of office secured by the constitution.

By the act making the division, the town of *Perth* was taken from the town of *Amsterdam*, and is in *Fulton*, and *Amsterdam* is left in *Montgomery*. By the laws of this state, a justice of the peace cut off from the town of *Amsterdam* and residing in *Perth*, is qualified to sit as a judge of the county court of *Fulton*. By what authority does he so sit? As a justice of the peace of the town of *Perth*, in the county of *Fulton*. What is his commission? And where is his constitutional oath of office? His commission is for the town of *Amsterdam*, in the county of *Montgomery*; both foreign corporations; and he has taken no oath of office except for them. According to the argument of the attorney general, his title is totally deficient and he has no right at all; yet it stands decided that he has such a right. And can it be said that the defendant cannot sit as judge of the same court when his commission covered every part of

The People v. Morrell.

the same territory alike? There is a distinction between the two cases, but no difference in principle.

By the Court, COWEN, J. By art. 1, § 7, of the constitution, the power of the legislature to create new counties is recognized, under the restrictive words: "No new county shall hereafter be erected, unless its population shall entitle it to a member" [of assembly.] By art. 4, § 7, "The governor shall nominate, &c., and with the consent of the senate, shall appoint all *judicial officers*, except justices of the peace," &c. By art. 5, § 6, "Judges of the county courts, &c., shall *hold their offices for five years*," &c. The question presented by the demurrer is, whether the office of Judge Morrell, who was duly commissioned and sworn as first judge of the county courts of Montgomery, was vacated by the division of that county into two counties.

The act is entitled "An act to erect a new county from a part of the county of Montgomery, by the name of Fulton," &c. Statutes, sess. of 1838, p. 328. The first section declares that the whole of Montgomery lying north of the prescribed division line, should be a separate and distinct county; and be known and called by the name of Fulton, &c. and that all the remaining part should be and remain a separate and distinct county by the name of Montgomery. The statute declares what would necessarily result as an operation of law, that the new county of Fulton should be entitled to and possessed of all the benefits, rights, privileges, and immunities, and be subject to the same duties, as the other counties of this state. Among those rights, is that to have a court of common pleas and general sessions of the peace, the times and places of holding which, after the 31st day of December, 1838, when Fulton was to become a new and distinct county, for the purposes of judicial business, were prescribed by the ninth section of the act. It is declared that the judges of the common pleas of the new county shall have power to cause a seal to be made for that court, &c. § 26, with various other provisions; none of which, however, indicate on the part of the legislature, any intent to continue the judicial officers in place for either county. Whether they remain, therefore, or

The People v. Morrell.

their places became vacant by the organization or creation of the two counties out of the old one, was left entirely to the operation of the constitution and the general laws, upon such a juncture of circumstances.

Independent of the restriction imposed by the constitution in respect to the tenure of office, there is no question that the legislature have the power directly to restrict the term during which a first judge shall hold. It is of the nature of legislation to create and abolish offices accordingly as they may be deemed useful or superfluous; and I am aware of no constitutional restriction which would prevent their discontinuing the county courts altogether, and substituting other jurisdictions of a more general or a more limited territorial extent. The county judges were created and their number limited by statute. 1 R. S. 87, 2d ed. Nor does the constitution any where declare even their existence to be essential. So long as they shall be required by statute, the constitution demands that they shall be nominated and appointed by the governor, on the senate consenting. But should the office be abolished and their powers transferred to a jurisdiction of greater or less territorial limits, the tenure of office would be gone. In the very instance before us, the legislature erected a court whose jurisdiction from April till December, 1838, covered two counties; and can any one doubt that they might now restore and continue the same power to judges who should be appointed according to the provisions of the constitution? The superior court of the city of New York was created by statute, with a jurisdiction, in respect to subject matter, greater than the common pleas of that city. Does any one doubt that the legislature might have merged the common pleas of that county or even of several others in the same court, had they been satisfied that such an act was necessary for the public good? I do not understand the state legislature to be restricted in their power any more than the British Parliament, except by the state and federal constitutions.

What then is the amount of constitutional restriction in the case before us? The county and the county courts of

The People v. Morrell.

Montgomery existing it was impossible for the legislature to remove Judge Morrell, or abridge his term of office. But the legislature had the power to create new counties out of the old one, provided the enumeration of inhabitants would warrant it. The following point was submitted to us by the counsel for the defendant: "The first section of the act of the legislature created two new counties, not by implication but by direct enactment. One is named Fulton, the other Montgomery, and the privileges that Montgomery has over Fulton are not secured by its *name*; but by express legislative grant in the 12th section. [The section which grants to the new county of Montgomery a property in the *records* of the old county of that name.] It is unnecessary to decide whether the point, so far as it asserts that the present county of Montgomery is a *new county*, in the legal sense of the term, be correct. The mode in which the legislature have expressed themselves indicates an intent, as I think, to continue the old county of Montgomery in that which retains the old name. Several other features of the act mentioned by the attorney general in the course of the argument, favor that idea. This being the case, no objection is perceived to the conclusion which seems to have been drawn by the government, that the commissions of such of the former officers of Montgomery as are qualified by local residence, should be considered as still in force with regard to the county of the same name. It is, in legal effect, the old county curtailed by the territory taken off for the new. But the constitution, as well as the nature of the office implies, and the statute, 1 R. S. 93, § 12, 2d ed., Id. 111, § 37, sub. 4, expressly requires residence within the county, as one essential qualification of a county judge. Judge Morrell fails in that qualification by being left without the boundaries of Montgomery, and within a county professedly new, and it seems impossible to maintain that, so far as the *new county* is concerned, it has not lost all legal identity with the old. Its territory, its inhabitants are no longer known as those of *the* Montgomery, for which Judge Morrell was appointed. Its towns are some of them intersected by the line of division. The statute which created the

The People v. Morrell.

county for which he was commissioned is, *as to Fulton*, repealed ; and the county is unknown to the constitution or the law. It *was* part of *Montgomery* ; it *is now* the new county *Fulton* ; and so completely is its identity gone by the dissolution, that, independent of any provision by statute, it would be absolved from all debts and duties due from, and deprived of all participation in the claims of the former county of *Montgomery*. 2 Kyd on Corp. 516. 1 Willcock on Municipal Corp. 330, pl. 858. The corporate succession is broken, and, at common law, all property in possession or in action, which its inhabitants could otherwise have claimed as corporators, would have reverted to the original donors, or vested in the state. *Id. id.* To guard against such a consequence, on the division both of towns and counties, the legislature of this state have interposed by statutes, 1 R. S. 330, 358, 2d ed. and provided for a summary distribution of property, &c., by commissioners. By another statute, actions may be brought in the name of the supervisors, loan officers, &c., and superintendents of the poor of a county ; and an action lies against the board of supervisors of a county. 2 R. S. 387, 8, 2d ed. Can it be pretended for a moment, that an action would be sustainable by or against the board of supervisors of *Fulton* in respect to rights or liabilities contracted by the old county of *Montgomery* ? I admit that merely changing the name of an old corporation, even with the addition or subtraction of rights, would not work a change of identity. Several cases are cited to this effect in 1 Kyd on Corp. 232, 3, n. ; but I do not find that the cases go farther. To sustain the supposed action, you must be enabled to aver and prove that the corporation, bearing both the old and new name, is the same. The statute which divided the counties might have declared that the old should have been continued in the new, and been considered the same ; but so far from doing this, it seems to look for corporate succession, to the new county of the same name. In trying the action we have supposed, it seems clear that a judge would be bound to charge the jury as matter of law, against the truth of the supposed averment. In the case at bar, the pleader has not hazarded such an averment. His

The People v. Morrell.

logic is, "I *was* the first judge of Montgomery; therefore, I am the first judge of Fulton," which he admits to be a new and distinct county. The conclusion that he is first judge of Ontario would seem to come with equal force.

The difference between the case before us and a mere *formal* change is quite obvious. Under a mere change of name, the commissions of the judges and all judicial acts might have continued the same *mutatis mutandis*. There would have been no substantial alteration. Had a town been added or set off, it would have been but an enlargement of territorial jurisdiction in the first case, and a contraction in the last. The commissions of the judiciary are granted and accepted, subject to all such changes as the legislature may think themselves bound to make from time to time, within the limits of their constitutional powers. No one doubts their power to add to or subtract from the territorial jurisdiction of local courts, nor to do the same thing in respect to subject matter. Indeed the latter may be said of any court, even that for the correction of errors. It does not follow that, because a court is created by the constitution or otherwise, its measure of power must therefore always continue the same.

The legislative power of creating *new counties* is equally plain in the nature of things with that of enlarging or contracting jurisdiction; it is equally sanctioned by practice in all times, and is expressly recognized by the constitution. New counties must be created out of the old; and then, even if the old offices could exist as abstractions, or in contemplation of law, they certainly cannot, by mere operation of law, be applied to *the new corporation*. The legislature doubtless have the power to continue them in the new county by express enactment. By doing so to the end of the constitutional term, they would detract nothing from the power of the executive department. But by remaining silent, the office is gone for all practical purposes. The county for which Judge Morrell was appointed was created by statute. It was capable of destruction by the same power; and it has been destroyed *pro tanto*. Was it ever thought that after a corporation is dissolved, its mayor or

The People v. Morrell.

other officers still retained their places, whatever the term for which, by charter, they might have been elected? They are but incidents to the corporation, which is an artificial being, capable of dissolution by act of the legislature, except in those cases wherein their power may be restrained by the constitution of the United States. 2 Kyd on Corp. 447. One effect of a dissolution is, that all corporate privileges and franchises are extinguished; and the creating power may either restore it, or incorporate another set of men in the same place. Id. 516. By proceeding to separate a part of the territory from an old county and erect it into a new, the legislature have incorporated another set of men as effectually as if the acts of dissolution and creation had been by separate statutes enacted at any distance of time from one another. One incorporated village, A., is divided by statute into two distinct incorporated villages, viz. B. and C.; independent of an express statute declaration, no lawyer would think of suing either B. or C. or both, for a debt due from A. Such a division the legislature may make even by a majority vote, either of cities or villages. *The People v. Morris*, 13 Wendell, 325. These are, like towns or counties, mere political bodies, and their powers may be modified, or the corporations themselves abrogated. Id. The recorder of a city is also constitutionally commissioned for five years. Const. art. 5, § 6. But he can no more hold his office after the city charter is repealed, than if the city should be physically destroyed. A simple legislative division into two new distinct cities would work the same consequence. In 1784, the town of Hempstead, owning lands as a corporation, was by statute divided into two towns by different names, South Hempstead and North Hempstead. The latter filed a bill against the former, for a partition of the common lands of the old town, which was dismissed by the chancellor, and the decree affirmed in the court of errors. *North Hempstead v. South Hempstead*, Hopkins, 288. 2 Wendell, 109. Chancellor Sanford said that, by the division, *two new corporations* were established in the place of *one*; and each of the new political bodies had a capacity to hold land within its own limits. The succession of the old town

The People v. Morrell.

was holden by both courts to be broken by the division, which in legal effect was adjudged to be an assignment of the common lands of Hempstead situate in each town, to the new corporations. On appeal, Savage, Ch. J. who delivered the opinion of the court, put the case of dividing one state or one county into two, and thought that the public property of the old would fall to the share of the new political bodies, so far as it should lie within their limits; and this may well be taken to be the legal effect of such a division. But no one pretended in the course of the cause that either new town was identical with the old one. A division by operation of law, or by an implied legislative assignment, may well be predicated of the former lands common to both, without its following that officers retain their commissions for each according to their respective residence. Land is severable, and our general legislation has long contemplated that each town should control the common lands lying within its borders. Real and personal property is apportionable by the courts between corporations as between individuals, according to their legal or equitable rights as proprietors. See *Potter v. Chapin*, 6 Paige, 639. It always finds a title to property somewhere; while an office is but the political adjunct of a political person; and cannot, in the nature of things, exist, when the latter becomes extinct. The dissolution of a corporation is, at common law, like the death of a natural person without heirs or distributees. It leaves no one to take its property or franchises as successor. The legislature may provide for a transfer, but the act enures by way of assignment, not as a corporate succession, unless it provided for renewing and continuing the old corporation.

On the whole, I have been unable to perceive that this new county, formed of a fragment from the old, can, in any sense, be considered its successor, or in any manner the same; and it seems to me that it must follow, according to the plainest reason and propriety, that the commission of judge for old Montgomery cannot as such have any existence in connection with the new county of Fulton. In saying so, I must of course be understood to mean such reason and propriety as I have been able to derive from the lan-

The People v. Morrell.

guage of the existing constitution and laws. I cannot deny that the legislature intended or rather desired to continue the commission of the defendant for the new county, and that they believed they had done so; nor do I deny that it would have been proper in a moral sense. Such a denial would be to contradict the high opinion which, through personal acquaintance, I have had the fortune to imbibe of the capacity and merit of the incumbent with whom the state is litigating. But I cannot avoid the conclusion that the legislature have, however unfortunately, when the measure is viewed as interfering with the general purpose of judicial independence, or wanting in justice to the man, inadvertently I have not the least doubt, failed to give any express or implied implication upon which we can refuse to render judgment of ouster. I am entirely satisfied from the best consideration I have been able to bestow, upon the case, aided as I have been by able arguments on both sides, that such an act would be to *legislate*, not to *adjudicate*.

Nor have I felt materially embarrassed in advancing to this conclusion, from any authorities which were cited on the argument. It was supposed by the counsel for the defendant, that the principle of the cases of *Ex parte M'Colum*, 1 Cowen, 550, and *The People v. Garey*, 6 id. 642, is adverse to the power of the legislature, so to alter counties, or other municipal corporations, or create new ones, as to abridge the constitutional duration of those offices which pertain to them. The first case held that a legislative organization of a new county, by combining several definite subsisting towns of other counties, and declaring that the justices already appointed for those towns respectively should hold for the residue of their terms in the same towns, and relatively to the new county, was constitutional. The last case held that, on a similar erection of the county of Orleans from definite subsisting towns of Ontario county, the legislature had no power to abridge the term of office for which the several justices had been appointed, while their towns belonged to Ontario; and a provision to that effect was declared to be unconstitutional and void. But in neither case was there even a change in the *name* or *territorial*

The People v. Morrell.

limits of the corporations to which the offices in question belonged ; much less an actual dissolution of those corporations. It is true some general remarks were made by the learned judges who delivered opinions in those cases, which, as it is supposed, give countenance to the proposition contended for by the defendant. In the first case, 1 Cowen, 566, 567, the chief justice intimated that the legislature have no power incidentally to abridge the term of a justice's office by altering the bounds of counties ; because what the legislature have no power to do directly, they cannot do indirectly. The proposition is undoubtedly true, when an exercise of their power is unqualifiedly forbidden. But when the prohibition is under qualifications merely, the case is entirely different. The alteration of counties may sever a town into such small appendages of different counties as to render its complete subversion by annexation to other towns, an act of decided expediency, with which I am not prepared to admit that the tenure of office should interfere. Both the cases cited, concede that the jurisdictional alterations may be made without limit, both as to territory and subject matter. All the powers of all the common magistrates in the state, for instance, might be abolished or transferred to the county judges. It is impossible to allow the constitutionality of such an indirect abolition of the office ; and to deny, at the same time, that the same thing may be incidentally done in respect to a few magistrates, by the exercise of another power which is admitted to be of itself, clearly constitutional. In the two cases cited, there was no necessity for contravening the consequences of exercising such a power. Justices were considered as town officers, a character which it was deemed essential to fix upon them in order to warrant the adjudication in *The People v. Garey*, 6 Cowen, 650, see also *Gurnsey v. Lovell*, 9 Wendell, 319, and *Schroepel v. Taylor*, 10 id. 196. And when Mr. Justice Sutherland remarked, 6 Cowen, 651, that the power of the legislature to erect new counties was subject to the constitutional limitation of the justice's term, he evidently intended a case where the corporation to which his office pertained was saved. That was the case before him. And

 Chautauque County Bank v. Davis.

the remarks of the chief justice in *M'Collum's case* should be taken with the same restricted application. Had the power of appointment for a certain time, been, in the case before us, granted in general terms, and the constitution had done nothing more, I agree that the legislature must have awaited the expiration of the time, before they could have given such an effect to the division of a county as to destroy the office. But we are no longer bound to carry out the full force of the general terms, when a clear convicting power is deducible from the context, either by express provision or necessary implication. 1 Story's Comm. on Const. Law, 407, § 424. In the state constitution, such powers indicated in both ways, are abundant. Besides the express power, recognized as we have seen, to create new counties, it is of the very nature of legislation to control judicial jurisdiction, and even subvert or dissolve the substratum, the municipal corporation to which it is incident. It is scarcely necessary to observe that in construing the language of a constitution, we have nothing to do with arguments *ab inconvenienti*, for the purpose of enlarging or contracting its import. Id. 408, 409, § 425 and 426. "The only sound principle is to declare *ita lex scripta est*, to follow and to obey." Id. 410.

We are all of opinion that there must be judgment of ouster.

 THE CHAUTAUQUE COUNTY BANK vs. DAVIS and others.

Where a *bill of exchange* is sent to an agent for collection, and merely for that purpose is endorsed to such agent in full, on the bill being returned to the owner protested, he may strike out the endorsement and bring an action in his own name; it is not necessary in such case there should be a re-endorsement.

THIS was an action of *assumpsit*, tried at the Chautauque circuit in July, 1838, before the Hon. NATHAN DAYTON, one of the circuit judges.

The suit was brought on a bill of exchange, drawn by *Henry Davis* and three other persons on *William Davis*, of

 Chautauque County Bank v. Davis.

the city of New York, for the sum of \$2536 61, dated at Brockport, 25th November, 1835, payable to the order of *A. D. Patchin, Esq.* three months after date. The action was *joint* against the drawers and acceptor, and was commenced by the service of a declaration, which contained the *money counts*, and had attached to it a *copy* of the bill of exchange, with the following endorsements: "Pay Richard Yates, Esq. cashier, or order, (signed) A. D. Patchin, cashier;" and, "Pay H. Baldwin, cashier, or order, (signed) R. Yates, cashier, per F. Leake." The signatures of the *drawers* and *acceptor*, and also due notice of dishonor, were admitted. The bill of exchange was then read in evidence, having all the endorsements stricken out, except the signature of *A. D. Patchin, cashier*. The plaintiffs rested, and the defendants moved for a nonsuit, on the ground that *title* to the bill was not shown in the plaintiffs. The plaintiffs thereupon proved that the bill belonged to them, that *A. D. Patchin* was cashier of the Chautauque County Bank, and that the endorsements to *Yates* and *Baldwin* were made solely for the purpose of collection. Whereupon the judge directed the jury to find a verdict for the plaintiffs, which was done accordingly. The defendants ask for a new trial.

J. A. Spencer, for the defendants.

A. Taber, for the plaintiffs.

By the Court, NELSON, Ch. J. The only question in the case material to notice is, whether the plaintiffs were warranted in striking out the special endorsements on the bill, so as to show a legal title in themselves.

The point I think was settled in *Bank of Utica v. Smith*, 18 Johns. R. 230. There the note was payable to the order of P. Smith, who endorsed it in blank; and the cashier of the plaintiffs filled it up, payable to *W. Fish*, for the purpose of collection. When returned dishonored, the plaintiffs struck out the special endorsement, leaving it in blank. The court say that *Fish* never had any interest in the note; that he was the mere agent of the plaintiffs, and that it was

Chautauque County Bank v. Davis.

settled in such a case that the holders might strike out the transfer, and make it payable to themselves. *Dugan v. The United States*, 3 Wheat. 172, is referred to, which is as strong a case as the one under consideration. That was a bill payable to the order of J. Clarke, and, by several intermediate endorsements, came to T. T. Tucker, treasurer of the U. S. or order. He purchased it for the government with government funds. It was afterwards endorsed by him to Messrs. Willinks & Van Saphorst specially, by whom the bill was presented for acceptance, and acceptance refused. When produced, the last endorsement was still on the bill, and the objection taken that the plaintiffs could not recover without showing a re-endorsement. But the court held that the case fairly implied that the endorsees were merely agents for collection, and that in such cases re-endorsement was unusual and unnecessary. In this case the agency is expressly proved after which there can be no possible objection to the owners, *the principals*, when the paper is returned, striking out all subsequent endorsements; even before the *return*, they might revoke the authority, and forbid the collection; and surely, when returned, and the agency at an end, they may obliterate the evidence of the authority.

It was said that *parol* evidence was inadmissible to show that the plaintiffs owned the note. But it is every day's practice in the collection of notes and bills, to admit proof of the real owner, and to regard him as the party, though the suit may be in a different name.

The opinion in the case of *Dugan v. The United States*, goes much farther than is necessary here: for it was held, that if any person endorse to another a bill of exchange, whether *for value or collection*, and shall come again to the possession of it, he shall be regarded, unless the contrary appear, as a *bona fide* holder, and may recover, notwithstanding there may be subsequent endorsements in full, without re-endorsement.

New trial denied.

Wilder v. Ewbank.

WILDER vs. EWBANK.

After distraining for rent in arrear, though the distress be insufficient to satisfy the rent, the landlord is not at liberty to institute proceedings for the removal of the tenant from the demised premises under the statute authorizing summary proceedings to recover the possession of land.

LANDLORD and tenant. *Certiorari* to one of the assistant justices of the city of New York, to remove proceedings before him to recover the possession of land for the non-payment of rent, there being no sufficient distress, pursuant to 2 R. S. 511, art. 1. Ewbank demised certain premises in the city of New York to Wilder, for one year from the first day of May, 1838, at the annual rent of \$700 payable quarterly. For the quarter's rent due on the first day of February, 1839, the landlord distrained on the day following. The distress produced only \$45, leaving \$130 of the rent unsatisfied, and there being no other goods, the landlord, on the 6th March following, instituted these proceedings to obtain possession of the demised premises. On the part of the tenant it was insisted that by distraining for the rent, although only a part of it was collected, the landlord had precluded himself from proceeding under this statute. The justice was of a different opinion and issued a warrant, by virtue of which the tenant was put out, and the possession delivered to the landlord. The tenant prosecuted this *certiorari* to review the decision.

J. J. Hill, for the tenant.

J. Holmes, for the landlord.

By the Court, BRONSON, J. This case falls within the principle of *Jackson v. Sheldon*, 5 Cowen, 448. I had prepared an opinion assigning the reasons why I think that case ought not to be followed. But my brethren are of opinion that we ought not to depart from the former case, and that the decision of the justice was consequently erroneous.

Proceedings reversed.

Oakley v. Boorman.

OAKLEY vs. BOORMAN & JOHNSTON.

A guaranty of a debt in the form of an endorsement of a promissory note is obligatory upon the guarantor; and in case of non-payment by the debtor, the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof.

A promise or obligation cannot be defeated in whole or in part, on the ground of the inadequacy of the compensation received for the obligation incurred—the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show fraud, mistake or illegality in its concoction, or non-performance of the stipulations of the agreement on the part of the promisee.

ERROR from the superior court of the city of New York. Johnston & Boorman sued Oakley as the endorser of three promissory notes, bearing date 9th July, 1835, amounting together to the sum of \$7868 80, made by one John Ordronaux, payable *eight months after date*, to his own order, and subsequently endorsed by him and passed to the plaintiffs for goods sold by them to a mercantile firm doing business under the name of *Helie, Verren & Co.* On the 14th September succeeding the date of the notes, the defendant, for the consideration of \$190, was induced to guarantee the payment of the notes, *which he did by endorsing the notes.* Between two and three weeks after the endorsement, Ordronaux failed. The defendant attempted to prove that the plaintiffs had knowledge previous to procuring the defendant's endorsements that Ordronaux's solvency was doubtful. The endorsements of the defendant were procured by a broker, who charged the plaintiffs \$700 for procuring them, though he paid the defendant only \$190. After the defendant had agreed to endorse, but before he affixed his signature to the notes, he inquired of the broker what he purposed to do with the notes, and was told that he intended to have them discounted at the Union Bank. The declaration counted upon the notes, and also contained the common money counts. The counsel for the defendant insisted that the defendant could not be held as *endorser*;

Oakley v. Boorman.

that the notes had never passed into his hands ; and at the time he put his name upon them, they were the property of the plaintiffs. That if the defendant was liable at all, it was as guarantor ; that his undertaking was to answer for the debt of another ; and that to make such an undertaking obligatory under the statute of frauds, it was necessary that it should be in writing, subscribed by the defendant, and for a consideration to be expressed on the face of the instrument. The counsel further insisted, that if the defendant was liable, his liability did not extend beyond the amount received by him on endorsing the notes. The chief justice of the superior court charged the jury that the plaintiffs were entitled to recover against the defendant as *endorser*, provided the jury, from the testimony, were satisfied as to the plaintiff's right to recover against the defendant. The jury found a verdict for the plaintiffs, on which judgment was entered. The defendant having excepted to the charge of the judge, sued out a writ of error.

S. Stevens, for the plaintiff in error.

G. Wood, for the defendants in error.

By the Court, COWEN, J. Had this been an ordinary contract of guaranty or insurance, there is no doubt that it must have contained all the requisites claimed for it by the defendant in the court below. A consideration must have been expressed, and been followed by an agreement to guarantee or insure the payment, and the whole been subscribed by the defendant below.

But the defendant below did not put himself in the position of a man expressly contracting to pay the debt of another by an ordinary simple contract, calling, in order to give it effect, for all the express requisites demanded by the statute of frauds. He chose to satisfy the statute in another way, which he had a perfect right to do. He endorsed these negotiable notes, in the hands of the plaintiffs, saying, "I choose to guaranty the debt in that form." This gave the plaintiffs below the authority to write over his

Oakley v. Boorman.

name an order or bill of exchange upon Ordranax, to pay the money, and subjected him as an endorser. *Smallwood v. Vernon*, 1 Strange, 478. Lord Ellenborough, in *Ballinglass v. Gloster*, 3 East, 482. Suppose that for the same consideration he had signed his name as maker to a note in blank, authorizing the plaintiffs to fill it up with the seven or eight thousand dollars; is there a doubt that he would have been liable as maker, and might have been so treated throughout? That doctrine is settled in respect to an endorser. *Russel v. Lanstaffe*, Dougl. 514. There a man endorsed blank notes with intent they should be filled up, and money raised on them. The plaintiff took them, knowing how and why they were endorsed, and sued the endorser—the declaration stating that he endorsed the notes *after* they were made. The defence was that they were endorsed prematurely. It was however given up by the attorney general. After Lee had argued it, Lord Mansfield said it did not lie in the defendant's mouth to say the endorsements were irregular. The defendant below here attempted the same thing in another form. He endorsed the notes for a valuable consideration while they were in the hands of the plaintiffs below, making out a complete case in point of form. He shall not after that be allowed to gainsay his own act. He is estopped; the act enures as an endorsement before the plaintiffs below obtained the notes. To all this the defendant below agreed, and he shall not be received to violate his agreement.

It has been held by several courts, that where a man puts his name on a note not negotiable, with intent to guarantee its payment, you may write a guaranty, indeed a promissory note, over the name, and expressing a valuable consideration. *Josselin v. Ames*, 3 Mass. R. 274. *White v. Howland*, 9 id. 315. *Hunt v. Adams*, 5 id. 358. *Palmer v. Grant*, 4 Conn. R. 389. *Beckwith v. Angell*, 6 id. 315. And see other cases cited in *Dean v. Hall*, 17 Wendell, 219, 220; *Seymour v. Van Slyck*, 8 id. 421, 2, and the cases there cited by Sutherland, J. At least, you may write the ordinary endorsement, which amounts to a bill of exchange. *Chit. on Bills*, 218, 219, Am. ed. 1836; *Hill v. Lewis*, 1

Oakley v. Boorman.

Salk. 132; and charge the defendant by notice. This would be making the contract most favorable to him. It is of the nature of a note or bill, and equally so of an endorsement even in blank, that it imports a consideration, the same as a specialty. Chit. on Bills, 79, Am. ed. 1836. Bayley on Bills, 33, Boston ed. 1836.

Since the revised statutes authorizing you to impeach the consideration of a specialty, the two species of paper occupy more nearly the same footing. In both, you may show a total or partial want of consideration; though in the case of negotiable paper, you may be cut off from that right by a *bona fide* transfer. But as between the original parties, either species of paper, imports a consideration; and this is considered a sufficient expression to satisfy that branch of the statute of frauds which requires that a guaranty of another's debt should show the consideration upon which it is made. See *Turnbull v. Trout*, 1 Hall's R. 336, and the cases there cited. Therefore, it is quite clear, that the suit was correctly brought against the defendant as endorser.

But it was strenuously insisted, that, admitting the defendant to be liable as endorser, he is so to the extent only of the consideration he has received. It is admitted that, had the note been *bona fide* endorsed before it fell due to the Union Bank, for the purpose of obtaining credit at which, Hamilton told the defendant his name was required, there would have been an end of the question. The bank would then claim by a title paramount in the eye of the commercial law; and the endorsement must have stood incapable of qualification. But it is equally well settled, as a general rule, that where such paper is contested between the original parties, whether payee and maker, or endorsee and endorser, the original consideration is open to examination; and the recovery may sometimes be reduced to the real consideration received, whatever that may have been. *Prima facie*, the liability of the undertaker is co-extensive with the face of the note. But it is so no longer, when it appears that the consideration came short of it. Such too, would now probably be the rule, even in regard to a specialty; at least, it would be so in case of a total want or

Oakley v. Boorman.

total failure of the consideration, in either of which cases, the plaintiff could not recover at all. In the case of a part consideration originally, or a partial failure, this is now uniformly held to furnish a defence *pro tanto*, though it is said you may still recover upon the note or endorsement so much as the consideration shall appear to have been, or so much as has not failed. In such case you certainly do not recover *according* to the special contract on which the suit is brought, if you can possibly be said to recover *upon* it. The promise on which the recovery is had, in all such cases seems to be collateral. It is implied by law, and different from what the parties have expressed, in so much that, on an express promise to pay one thousand dollars, you may recover as on a promise to pay but one hundred. It would be more logical, perhaps, to say that you do not, in such case, recover upon the special contract; that it is defeated or destroyed, because not sustained by the proper aliment, and the party is thrown back upon his common counts, to recover as upon the original consideration. Suppose that a horse were warranted to be sound, and sold, on a note of \$200; but, by breach of the warranty, the party ought to recover but one hundred; the note might be dismissed as void; but by inserting a count for goods sold, the inferior sum might be recovered on the usual implied obligation to pay what the horse, which the defendant had purchased and converted to his own use, was worth. So of money advanced as the consideration of making or endorsing a note much larger in amount than the money in consideration whereof it was so made or endorsed; the implied obligation is to refund the money; and the action is, perhaps, more properly for money had and received. This theory is not, however, maintained, as I apprehend, in practice; for the note may be negotiated after it is dishonored, and the holder recover the sum, thus equitably due, as upon the paper itself. The law, therefore, seems to raise a new negotiable contract between the parties; or, rather a contract which is different from the one which they have expressed; and the holder recovers according to the contract thus created. It is partially avoided, and left to avail with all its nego-

Oakley v. Boorman.

liable qualities about it, subject to be qualified by equities which may exist against it. The phrase is, that a *mala fide* holder takes with the same, but no greater rights than the original party from whom his title is derived. It is enough that the contract of the party is perfect on its face, as that of a maker or endorser. It may be cut down; but beyond that, it maintains its character in all respects, whether in the hands of a former or any subsequent holder.

What are the extent and principle of that defence by which a negotiable paper may be thus reduced? In the case of a simple endorsement, for the consideration of a sum of money, which is less than the face of the note, the endorser is liable for the sum he received and that only. This has been repeatedly held, where a valid business note has been sold for less than its face, and especially where such a limitation has been necessary, in order to avoid the imputation of an usurious intent. *Braman v. Hess*, 13 Johns. R. 52. *Munn v. The Commission Company*, 15 id. 44. *Cram v. Hendricks*, 7 Wendell, 569. But where the party endorses in such case, with the avowed purpose of securing the full amount of the note, it has never been holden that the contract could not be avoided on the statute of usury. Otherwise, the transaction is regarded as a sale of the note, the vendee to take his chance of collecting from the maker, with the privilege of resorting to the endorser for the real sum advanced and the simple interest. The contract being open to such an interpretation, it has been uniformly holden in this state, that the transaction is not usurious, though it may have often been made a cover for usury and by some courts is treated as usurious on its face. I have just now cited the prominent cases decided by this court and the court of errors. On these the plaintiff in error relies. It is insisted on the authority of these and like cases, see *Livingston v. Hastie*, 2 Caines, 248, and 13 Johns. R. 52, Bayley on Bills, 544, Bost. ed. 1836, and cases there cited, as between the original parties, or a third person holding *mala fide*, you may universally inquire into the value of the consideration, and the amount of obligation shall be reduced and made commensurate with it. The proposition, put in

Oakley v. Boorman.

that form, is quite inaccurate, and will not hold in one instance out of a thousand. By departing from the agreement of the parties, there is scarcely an instance wherein you may not show that the obligation is in some points of view greater than the consideration which was paid for it. Almost every bargain is incapable of being made exactly equal on both sides; and if we suppose the losing party to have secured his side of the obligation by a note or endorsement, and allow the abstract value of the consideration to be looked into as a guide, there would be no safety in commercial paper, as between the original parties. Such a principle would lead to a perpetual inquiry into the adequacy of the consideration, and courts would be put to the office of making new bargains or destroying or modifying those already made, instead of enforcing them. Hence the law has declared, that the slightest consideration is sufficient for the greatest undertaking, see 1 Wms. Saund. 211, *b*, close of note 2, Phil. ed. of 1807; and when you seek to impeach the consideration, you do not address yourself to its inadequacy, *Solomon v. Turner*, 1 Stark. R. 51, but the meaning of the rule is, if there were fraud, mistake or illegality in its concoction, or if the party seeking to enforce it has himself violated some obligation incurred on his part: for instance, a warranty, an engagement to deliver goods, or the like, the promise sought to be enforced may be destroyed or reduced, according to the measure of the defect. See the various instances, Bayl. on Bills, 530 to 544, Bost. ed. 1836. *Id.* 557 to 570. The same result follows from matter of legal defeasance or discharge. A contract of insurance against the perils of the sea or against fire or of a life, for a small premium, many times turns out, according to the event, to be extremely unequal. Yet suppose the underwriter were, in every such case required to give security by the endorsement of a third person, who enters into the collateral engagement in consideration of even a still less sum, is it to be endured that, on a loss happening, he should bring down his contract to the trifle advanced by way of premium? Why may not the principal obligation be put in the form of a note or endorsement, with a stipulation that the paper should be

Oakley v. Boorman.

void in the event that no loss happens? Can there be a doubt that such a contract would be valid? Yet if, in case of a loss, we allow ourselves to be governed by the pecuniary amount of the consideration, we violate the rule of law which declares the slightest consideration sufficient. The inquiry in all such cases is, not how much you have received as a consideration for your promise; but what is the amount that you have really promised to pay. You may indeed impeach the consideration, but not for its amount. In the case at bar, the defendant was allowed to show every circumstance tending to prove that he was circumvented. He sought to prove that the plaintiffs below were alarmed and endeavored to deceive him as to the responsibility of Ordronaux; that the broker set up a false pretence of the real object being to put the note in a condition for negotiation at the Union Bank; and the question of fraud was, we are to intend, properly submitted to the jury, who found that the contract was fair in all respects. The very notion of inadequacy of price is wholly unknown to the law of insurance. No matter how great the risk taken, nor how small the premium; or on the other side, how enormous the premium or slight the hazard, if the contract be fair. Verpl. on Contr. 42. It is not for us to hamper Mr. Oakley, or any other citizen, in such a way as to preclude his making money by insuring the debts of his neighbors. It is enough that he has not been imposed upon. He was *sui juris*. He fixed the consideration of his endorsement; and had it been to secure a much larger amount, the result must have been the same. There is no distinction, in principle, between an endorsement to secure future advances, and an endorsement to secure a precedent debt. Indeed, so far as safety may be concerned, the latter is the best for the guarantor. The guarantee, in the first case, advances all upon the faith of the contract, and so the consideration is larger on his part; but the guarantor is bound though he receive nothing, and may incur a great and indefinite loss on the amount yet to be advanced, he knows not how much. An endorsement to secure a precedent debt is very common in consideration of a few months' credit. See an instance in *Livingston v.*

Oakley v. Boorman.

Hastie, 2 Caines, 246, also in *Free v. Hawkins*, 1 Taunt. 92, 1 Moore, 535, S. C., *Beardsley v. Warner*, 6 Wendell, 610, 8 id. 194. What, in that case, is the consideration which the endorser gets? Most commonly nothing, and all that the endorsee suffers is a short delay. The endorser may say in such case, with at least equal truth as in the case at bar, that the consideration is short of the amount for which he became bound. There are many cases in the books much stronger than this; most of the cases wherein actions on wagers have been maintained are stronger. See *Good v. Elliott*, 3 T. R. 639, and the cases there cited. *The Earl of March v. Pigot*, 5 Burr. 2082, is among the most striking. Two young heirs apparent, at New Market, agreed, as the report has it, to run the lives of their fathers against each other by a bet. The plaintiff's bet was 1600 guineas against 500. The defendant gave a note to the plaintiff of 500 guineas, payable if his (the defendant's) father died first. In fact he had already died, though this was not known to either party. The consideration was holden sufficient. Lord Mansfield said, "The question is what the parties really meant." He answers, "The intention was that he who came first to his estate should pay this sum of money to the other who stood in need of it." And scandalous as the transaction was in point of morals, yet being, by the English law, technically valid, the consideration was held sufficient. If this be deemed an extravagant case, take it that the defendant's father had died the next day, and yet all the consideration would lie in the chance of the father on the other side dying first, and so obtaining the sum bet on that side, which would thus be seen by the event, to be the merest trifle. But the case, as it stood, has been lately recognized as law in *Barnum v. Barnum*, 8 Conn. R. 469. There was a rumor that a lottery ticket had drawn \$2000, on which the defendant purchased one fourth of it, and gave his note to the plaintiff for \$200; whereas the ticket had at the time come out a blank. Daggett, J. said, "This for aught which appears, was a fair speculation. Neither of the parties, as the facts show, knew the fate of the ticket. It was, therefore, a bargain of hazard.

Oakley v. Boorman.

In the absence of all fraud, it is not easy to see why the plaintiff should not recover upon the principles of law." I have before mentioned contracts of insurance, to which the endorsement now in question more properly belongs. And there is a large class of contracts which we should impeach, by deciding that the amount of the recovery can in no case exceed the money paid as a consideration. These are called by Pothier, 1 Ev. Poth. 10, 11, Lond. ed. of 1806, aleatory (or hazardous) contracts. He says such contracts are those by which one of the contracting parties, without contributing any thing on his part, receives something from the other, not by way of gift, but as a compensation for the risk which he runs. Among such he instances all games of chance, wagers and contracts of insurance; whereas the mere sale of a note comes within one subdivision (*do ut des*) of commutative contracts. Id. 10. Either may, under our law, unquestionably be made in the form of a note or endorsement, and the extent of the consideration, as between the original parties, may be inquired into; but they must be sustained according to the intent and object of the parties, as in *Earl of March v. Pigot*. The case of *Braman v. Hess* and *Cram v. Hendricks*, and their kindred cases, cannot be maintained except on the same principle. The court must be able to say that where a note of \$1000 is sold and endorsed on an advance of \$900, the intent of the parties, endorsee and endorser, is that the latter shall be holden for the \$900 only; or it must declare the endorsement void for usury. To maintain such an endorsement, the doctrine of presumption in favor of an innocent intent has been very strongly applied. Courts have inferred, without explanatory evidence, that a contract which in connection with the consideration paid, imports usury in its terms, was meant to be for simple interest only. But no court, I trust, will ever hold that, should evidence *aliunde* be given, showing the real intent of the parties to be according to the import of the endorsement, it could be sustained for a moment.

The judgment of the court below is affirmed.

Rogers v. Arthur.

ROGERS and wife *vs.* ARTHUR and others.

In an action of *ejectment* against *several defendants*, if it appear that the defendants occupy *distinct parcels* in *severalty*, the plaintiff may elect to take a verdict against one of the defendants; whereupon a verdict will be rendered in favor of all the other defendants.

It seems, that where a party claims an *undivided share* of a tract of land possessed by several defendants in *severalty*, and brings a separate action against each defendant and recovers, that commissioners appointed to make partition of the tract would be authorized to allot to the plaintiff in such actions a *portion of the whole tract in severalty*; and would not be limited to set off to him a portion of each separate recovery.

THIS was an action of *ejectment*, tried at the Oneida circuit in October, 1838, before the Hon. PHILO GRIDLEY, one of the circuit judges.

The plaintiffs claimed to recover *three-sixteenths* of 640 acres of land, held *in common* and *undivided*, with the owners of the residue of the tract; and deduced title from *Joseph Montague*, who, on the 30th January, 1799, conveyed the tract of 640 acres to one *Jacob Cram*, from whom the plaintiffs derived title. The plaintiffs attempted to show that the defendants *also* derived their title from *Montague*. The defendants were *five* in number, and it was proved that they occupied distinct parcels of the premises in *severalty*. The defendants moved for a *nonsuit*, on the grounds: 1. That the plaintiffs were not entitled to support a *joint* action against them; and 2. That they had failed in showing that *Montague* was the common source of title to both parties. The *nonsuit* was granted, and the plaintiffs ask for a new trial.

C. P. Kirkland, for the plaintiffs.

C. A. Mann, for the defendants.

By the Court, NELSON, Ch. J. In *Jackson, ex dem. Murray, v. Hazen and others*, 2 Johns. R. 438, which was an action of *ejectment* against *five defendants* who pleaded

Rogers v. Arthur.

jointly, it was held that the plaintiff was bound to prove a *joint* possession against all, and that *two* of the defendants who held *separately* were entitled to judgment. In *Jackson v. Wood and others*, 5 Johns. R. 278, where the question again came up, it was decided that the plaintiff might recover against all, though the possessions were *separate*; not *jointly*, but by taking a *separate* verdict against each defendant for the part of the premises of which he was proved in possession. The court, upon a full review of the law, were of opinion that the doctrine of the first case was pushed too far, and virtually overruled it. The case of *Jackson v. Wood* has since been followed, and would be the rule now, had it not been changed by statute. 2 R. S. 307, § 28, 29. 5 Wendell, 96. 7 id. 152. By § 29, it is provided, when the action is against several defendants, if it appear on the trial that any of them occupy *distinct parcels in severalty* or *jointly*, and that other defendants possess other parcels in *severalty* or *jointly*, the plaintiff shall elect at the trial against which he will proceed; which election must be made before the testimony is closed, and a verdict shall thereupon be rendered for the defendants not so proceeded against. This section was intended to restore the principle of the case of *Jackson ex dem. Murray v. Hazen and others*; the rule adopted in *Jackson v. Wood* being considered as unnecessarily perplexing the proceedings, and operating to exclude those who would otherwise be competent witnesses.

It is urged by the plaintiffs, that inasmuch as they claim an undivided interest in the whole of the premises, unless they are permitted to recover *jointly* against all the defendants, they will not be able to obtain an undivided portion of the *whole*, but only of *several* parts, and be thus prevented from acquiring their legal rights. We do not perceive much force in this objection, because, if a joint recovery should be allowed of an undivided half, partition would still be made with reference to the distinct and separate rights of all the parties concerned, 2 R. S. 322, § 30, and the commissioners be justified in regarding the possession of each occupant. It is sufficient for us, however, that the statute has

Sea Ins. Co. v Fowler

settled the rule in the action without any qualification ; and even before its adoption, no case had gone the length claimed here. The utmost that was allowed was to take a separate verdict for each separate parcel in possession of the defendants, and thereby avoid the necessity of several actions.

The above view supersedes the necessity of discussing the other objection to the recovery, viz. that it was not shown that *Montague*, under whom the plaintiffs claimed, was the common source of title. The evidence on this point was slight, and clearly imperfect as to some of the defendants.

New trial denied.

THE SEA INSURANCE COMPANY vs. FOWLER and others.

Where an *insurance* was effected at New York on goods laden or to be laden on board the brig *Abeona*, from one port to another, and the goods were shipped in a vessel called the *Abeona*, which subsequently was lost, and it appearing that there where two vessels frequenting the port of New York called *Abeona* : one a brig, and the other a schooner, half brig, brigantine or *hermaphrodite brig*, and that the goods were embarked in the latter vessel, it was held, that without proof that the vessel in which the goods were laden was in the contemplation of the parties at the time of the contract, there was no room for the presumption that the parties meant a different vessel from that described in the policy.

ERROR from the superior court of the city of New York. *Fowler and others* brought an action against the Sea Insurance Company, on a policy dated 28th October, 1835, by which the defendants insured goods and merchandizes valued at \$3000, laden or to be laden on board the good brig *Abeona*, at and from New York to Newfoundland. The goods were shipped at New York, in a vessel called the *Abeona*, which was lost on the voyage to Newfoundland. In the protest made by the master and one of the seamen, the vessel was uniformly called a *schooner*. The plaintiffs, after reading certain admissions and the protest, rested the case, and the defendants moved for a nonsuit, on the ground that it appeared by the policy that the cargo was insured on board the brig *Abeona*, and it appeared by the protest that the

schooner Abeona was lost. The plaintiffs then called a witness who testified that they shipped a cargo to Newfoundland by the vessel *Abeona*, the vessel that was lost; that she was an *hermaphrodite brig*, and was lying in New York at the time, the insurance was effected; that there was no *schooner Abeona* in port at that time; that this was a colonial vessel, and vessels of her construction were in the colonies sometimes called *schooners*, and sometimes *brigs*. *W. Newcomb*, inspector of the New York Marine Insurance Company, said he had described this vessel in his book as an *half brig*, *brigantine* or *hermaphrodite brig*, being a brig forward and a schooner aft; that she was not an uninsurable vessel, but the company did not like to insure her; they take risks freely on cargoes in vessels of that class. Two other witnesses testified that she was an *hermaphrodite brig*, and *C. Holmes*, inspector of the Union Insurance Company, testified that she was a *half brig*.

On behalf of the defendants, their secretary testified that the plaintiffs on the 16th October, 1835, applied in writing to the defendants for insurance on goods valued at \$1000, per the British *schooner Abeona* from St. Johns to New York; this was on the voyage to New York. The defendants had not inspected, and knew nothing about the vessel, but insured on the representation of the plaintiffs that she was a fair vessel. On the 28th October, 1835, the plaintiffs applied in writing for insurance on the *brig Abeona* from New York to Newfoundland, and the policy in question was issued. When the last mentioned application was made, the defendants' inspector was not in, and the president referred to the books to see how the vessel stood, but she was not on the books of the company. As the amount was considerable, and the prejudice against British vessels was great, the president went to the *Atlantic* office, and on his return agreed to take the insurance in consequence of the information he received. *S. G. Waring*, inspector of the *Atlantic* company, testified that there are two vessels called the *Abeona*, both British; that one is a *brig*, the other a *schooner*; that the *brig* was considered

Sea Ins. Co. v. Fowler.

a good vessel for a British vessel, and the *schooner* was a poor vessel; he should not consider her as insurable; is entered so in the books; he recommended his company not to insure her. The witness had seen and examined both vessels in New York. That the vessel in question in this action was the *schooner*; she was a top sail schooner, not an *hermaphrodite brig*; she was a *schooner* in every sense of the word, as witness understands it. That British schooners very often resemble brigs. There is a difference between an hermaphrodite brig and a schooner, but a casual observer would be apt to mistake one for the other.

The defendants offered to prove that their president on his return from the *Atlantic* office had the *brig* registered in the books of the company as an *insurable* vessel, and the *schooner* as an *uninsurable* vessel, and the one as a *brig*, and the other as a *schooner*. This evidence was rejected, and the defendants excepted.

The chief justice charged the jury, "that the application for insurance, described the vessel as the *brig Abeona*, and if she was in fact a brig, then there was no misdescription of her; if, however, they should be of opinion that she was a *schooner* and not a brig, or if from her build or manner of being rigged, the appellation of brig could not be applied to her, but was a misdescription of her, and if such misdescription was material to the risk, and the defendants were misled by it, and induced to take a risk greater than the one which they contemplated and intended to take, and which they otherwise would not have taken, they should find a verdict for the defendants; but if she was a brig, or if that appellation of her was a misdescription, and such misdescription was not, under the circumstances of the case, material to the risk, then they should find for the plaintiffs. The defendants excepted; and the verdict and judgment having passed against them, they now bring error.

A. G. Rogers, for plaintiffs in error.

R. J. Dillon, for defendants in error.

By the Court, BRONSON, J. Upon the evidence, there were two British vessels of nearly the same capacity, both named *Abeona*, and both having been in the port of New York. The one was a *brig*, and the other was either a *schooner* or a *half brig*, *brigantine* or *hermaphrodite brig*. The very decided opinion of the witness Waring, that this vessel was a *schooner*, is pretty strongly confirmed by the fact that the plaintiffs had so designated her in their proposals for insurance on the voyage from St. Johns, and by the further fact that she was called a schooner by the master and one of the seamen in their protest after the loss. None of the witnesses call her a brig proper, but several of them think her a half brig, or a brig forward and a schooner aft. The brig was a *good* vessel, and the schooner or half brig a *poor* one—the one was *insurable*, the other according to Waring, was *not* insurable. Newcomb, the only other witness who speaks to the point, says this was not an insurable vessel, *but his company did not like to insure her*. The brig was undoubtedly a much better risk for the insurers than the schooner or half brig.

But independent of the difficulty growing out of the increased risk, I am unable to say that the policy ever attached. The insurance was on goods laden or to be laden on board the *brig Abeona*; the vessel lost, and on board of which the goods were laden, was the *schooner* or *half brig Abeona*. It was a different ship from that mentioned in the contract. This is not the case of a simple misnaming or other misdescription of a particular vessel, about which the parties intended to contract, and where, notwithstanding the mistake, the subject can be sufficiently identified. See *Le Mesurier v. Vaughan*, 6 East, 382, and the case there cited by Lawrence, J. of *Hall v. Molineaux*. 1 Phillips' Ins. 64, § 1. 1 Marshall (Condy's) Ins. 314. Here there were two vessels of the same name, but of different species. The policy describes with accuracy one of the vessels, and not the other. In such a case, there is no principle which will authorize us to presume, *without proof*, that the parties meant a different vessel from that described in the contract. A change of the ship, made without necessity or the consent of the insurer, will

Sea Ins. Co. v. Fowler.

avoid the policy, although there may be no increase of the risk. 1. Marsh. Ins. 166, 312. The parties are only bound by their contract.

Although the *schooner* or halfbrig Abeona was in port at the time the insurance was made, there is no proof that the underwriters knew that fact, or that they knew that the *brig* Abeona was not also in port at the same time. There is not only the absence of any just ground for inferring that the defendants intended or were willing to insure on the schooner, but the evidence furnishes ground for the contrary inference. The application was for insurance on the cargo of the *brig* Abeona. The defendants seem not to have known any thing about the vessel. Their inspector was not in, the vessel was not on their books, and the president went out to make inquiries. He went to the office of the Atlantic company, and on his return agreed to take the risk. If he examined the books of the Atlantic company, he found that there was both a *brig* and a *schooner* called Abeona; that the brig was a good vessel, and the schooner a poor one; that the one was considered insurable, and the other not. If, without consulting the books, he inquired of the officers of the Atlantic company, he probably obtained the same information. There is then reason for believing that the defendants not only supposed they were insuring on the brig, but that they would not have consented to take a risk on the vessel which was lost. But it is enough that the contract relates to one vessel, and the goods were shipped by another. It is for the plaintiffs to show, if that can be done, that although the brig was mentioned in the policy, the schooner or half brig was the vessel about which the parties intended to contract.

It follows, I think, from what has been said, that the case was not properly submitted to the jury, and that the exception to the charge was well taken.

Judgment reversed.

 Acker v. Burrall.

ACKER vs. BURRALL.

A *covenant* entered into by a third person, on receiving property levied upon by a sheriff, to deliver it to the sheriff on request or *pay the debt*, is a valid obligation within the statute declaring *void* all bonds, &c., taken by a sheriff or other officer by color of his office, in any case or manner other than provided by law.

The statute forbids only what is *illegal*, it vitiates securities taken for *ease and favor*; and does not render void securities *authorized* either by the common law or statute. Unless there is *duress or oppression or illegal execution*, the security is good.

A levy upon partnership property, by virtue of an execution against one partner, cannot be alleged as *illegal* in bar to an action upon such covenant; especially where the other partner consented to such levy.

DEMURRER to declaration. The plaintiff declared on a covenant executed by the defendant, whereby, after reciting that the plaintiff, as sheriff of the city and county of New York, had levied upon \$8511 56 in bank bills, \$300 in treasury notes and \$150 in gold, by virtue of an execution in favor of John T. Smith *vs.* Horace Janes, and had on request left and permitted the same to remain in the possession of the now defendant Burrall, the defendant in consideration of the premises and of one dollar to him in hand paid, covenanted and agreed with the plaintiff to deliver to him the said property upon request; and in default thereof to pay and satisfy to the plaintiff the amount to be levied on the said execution and all fees and poundage thereon. The plaintiff assigned the non-delivery of the property upon request made, as a breach. The defendant pleaded, 1. That the goods and chattels specified in the declaration were not the property of *Horace Janes*; and 2. That *at the time of the levy* the defendant and Horace Janes were *copartners*, and that the goods and chattels levied upon were at the time of such levy the property of and belonging to the said copartnership, and that the defendant as such copartner, after the making of the covenant and before request to deliver property to the plaintiff, applied it to the uses and purposes of the copartnership. To these pleas the plaintiff demurred.

Acker v. Burrall.

S. Stevens, in support of the demurrers, was stopped by the court.

S. A. Foot, for the defendant, contended that the covenant was void,^a as taken *colore officii*, contrary to the statute, which declares that "no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed shall be void." 2 R. S. 286, § 59. He admitted that under the former statute a receipt taken by a sheriff for property levied upon, had been held valid, and possibly it might be adjudged good under the present statute, as being neither a bond, obligation or security within the terms of the statute. He however urged that the intent of the statute was to declare void all securities taken in any other case or manner than such as are provided by law. No provision is made by law even for the taking of a receipt; and if the statute should operate inconveniently, the legislature only are responsible. The language of the act is clear and explicit, and the court cannot make any exceptions. That this statute is much broader, both as to subject matter and persons, is stated by Mr. Justice COWEN, in 19 Wendell, 191. If it should be conceded that a receipt taken would be held valid, it did not follow that a covenant like that in question would be adjudged good; the engagement of the *receiptor* is to deliver up the property or *pay its value*, whereas the alternative here is to *pay the debt*—the amount to be levied on the execution. The debt might greatly exceed the value of the property, and thus the officer might abuse the power he possessed. This was an evil which the statute was calculated to prevent, and the *covenant* should therefore be adjudged void. He also insisted that the *first plea*, which alleged that the goods and chattels were not the property of Horace Janes, was good. The sheriff is authorized to levy upon gold, coin and bank bills *belonging* to the defendant in an execution. 2 R. S. 366, § 18, 19. Here the demurrer admits the property did not belong to him. Had the defendant been a *receiptor* and

Acker v. Burrall.

the property taken from him by paramount title, such fact would have created a bar to a recovery against him. 13 Mass. R. 224. Story on Bailment, 98. 16 Wendell, 335. The second plea also, he urged, constituted a perfect defence. On an execution against one partner, the other partner cannot be deprived of the possession of the partnership property; if any interest in the partnership property can be sold under an execution against one partner, it is only his equitable interest. 16 Johns. R. 102, n. 15 Vesey, 559. 1 Wendell, 311. 12 id. 131.

By the Court, COWEN, J. The pleas are clearly bad. The first plea does not deny that the money levied on was Janes' *at the time of the levy*. It simply says, it was not his, without saying *when*. The second plea admits that he was a joint owner, and *non constat* by this plea, but that, as partner, he might have owned the whole property except a common interest of a few cents in the defendant. But a decisive answer to both pleas, is that the defendant is estopped by his covenant to deny the plaintiff's property; at least, till he has been evicted by title paramount in some third person.

The covenant is valid. It comes neither within the words nor the spirit of the statute cited. That forbids only *what is illegal*. The object was, like the old statute of 23 Hen. 6, ch. 10, against securities taken for ease and favor, to make the whole void where a part was so; not to disallow securities which officers were authorized to take either by the common law or statute. The right which a levying officer has, to take a covenant like this, where he thinks he can do so with safety, is not only well established by authority and practice, *Beaufage's case*, 10 Coke, 99, *Hoyt v. Hudson*, 12 Johns. R. 207, but the provision of the law is, in this respect, a very humane one.

That the sheriff acted illegally in levying on partnership property under *fi. fa.* against one of the partners, especially where the co-partner of the defendant in the execution consented, as in this case, cannot be admitted for a moment.

The People v. McNair.

No want of consideration, no duress, no oppressive or improper conduct on the part of the sheriff, by which the defendant was drawn into this covenant, is pretended by either of the pleas.

There must be judgment for the plaintiff; and the pleas are so obviously defective, that leave to amend is denied.

THE PEOPLE vs. McNAIR.

Where a witness called to testify is of tender years, the party against whom he is called, may require that he shall be examined as to his understanding of the nature and obligation of an oath.

CERTIORARI to a court of special sessions. The defendant was tried before a court of special sessions and a jury, on a complaint of an assault and battery committed by him on the body of *William Bean*, a lad of *eleven years of age*. The defendant was a *schoolmaster*, and the lad his scholar. The assault consisted in alleged cruelty on the part of the defendant, whilst correcting the complainant for misconduct in school. The lad was sworn and examined as a witness; the defendant requested the court, before he testified, to question him in regard to the nature of an oath. One of the presiding justices, being the same justice before whom the complaint was made under oath by the lad *Bean*, observed that he had before examined him in regard to his competency as a witness, and was satisfied as to his competency; and the justices united in returning that *they* did not put any questions to the lad as to the nature of an oath, being well satisfied that he was an intelligent boy, and understood the nature of an oath. The jury found the defendant guilty, and the justices imposed a fine of twelve dollars. The defendant sued out a certiorari.

Ward Hunt, for the plaintiff in error, insisted that it was the duty of the court, on the request of the defendant below, to have examined the witness in the presence and hearing of the defendant and the jury, as to his knowledge of the

The People v. McNair.

nature of an oath; and that the previous examination of him by one of the justices would not excuse the omission. 1 Phillipps' Ev. 14, 16. 2 Starkie's Ev. 727. 18 Johns. R. 105.

Willis Hall, (Attorney General,) for the people. Had the witness been examined as to his knowledge, and the testimony returned, though this court might not have been satisfied with it, the conviction would not, for that cause have been quashed. The justices here return that the witness was an intelligent boy, and that they were well satisfied that he understood the nature of an oath. Why then should they examine him?

W. Hunt, in reply. He should have been examined, so that the jury might have passed upon the question.

By the Court, NELSON, Ch. J. The court erred. The lad was of tender years, and if it had turned out, as it might, that he was wholly ignorant of the nature of an oath, it would have been the duty of the court to have rejected him as a witness, or at least before permitting him to testify, to have instructed him on the subject.

One of the justices assigned as a reason for the decision of the court, that he had before examined the witness as to his competency, and was satisfied; but it does not appear when or where he so examined him. The defendant was entitled to have the examination in his presence, on the trial before all the justices.

Conviction quashed.

McMorris v. Simpson.

McMORRIS vs. SIMPSON.

Where a quantity of butter was put into the hands of an agent who was proceeding to the city of New York to sell, with directions *to do the best he could with it ; to do as well with it as if it was his own ;* and the agent, after endeavoring in vain to dispose of it in New York at a fair price, finding the market dull, sent the butter of his employer, *together with his own,* to a market at the south: *it was held,* that the judge was not authorized to instruct the jury that the agent was bound to sell in New York, *and not elsewhere ;* that the question of excess of authority should have been submitted to the jury upon the evidence as to the usual course of business in relation to such matters.

Ordinarily, an action of *trover* will not lie by a *principal* against his *agent*, unless it appear that the *agent* has converted the property of his *principal* to his own use, or disposed of it contrary to his instructions ; there must be some *act* on the part of the agent ; a mere *omission* of duty is not enough, though the property be lost in consequence of the neglect. Nor will *trover* lie where the agent, though wanting in good faith, has acted within the general scope of his powers.

THIS was an action of *trover*, tried at the Delaware circuit in May, 1837, before the Hon. JAMES VANDERPOEL, then one of the circuit judges.

Both parties are farmers, residing in the county of Delaware. The defendant, when he went to market with his own butter, had been in the habit of taking and selling butter for his neighbors, for which he received a commission of fifty cents per firkin. In the fall of 1833, the plaintiff called on the defendant and asked him when he was going to New York, the defendant answered within a day or two ; and the plaintiff then said he had left his butter in *Catskill*, (eleven firkins,) and wanted the defendant to take it and *do the best he could with it ;* the defendant answered that *he would do as well by it as if it was his own.* *Nothing was said by the plaintiff about the place where he wanted the butter sold.* The defendant asked the plaintiff if he had put any price on the butter ; the plaintiff answered no, but wished the defendant to do as well by it *as if it was his own.*

The defendant went to New York, where he remained several weeks, endeavoring to sell the butter he had taken down : finding the market dull, and the price unsatisfactory,

McMorris v. Simpson.

he sent the butter in question, *together with his own and his son's butter*, to the south, to be sold by *H. & J. R. McLaughry*, who were residents of Delaware county. In October, 1835, the plaintiff brought an action of *trover* for the eleven firkins of butter.

A witness testified that the usual custom was to sell in New York; that the market was either Catskill or New York. Another said he had always understood the custom to be to sell in New York; he considered the custom well settled that the butter is to be sold in Catskill or New York. A third witness had known of several instances of butter being sent to other markets when it was dull in New York; a good deal of butter was sent south in the fall of 1833 with the *McLaughry's*; but the witness did not know that it was the custom for persons who took their neighbors' butter to sell, to send it abroad. *Gibbon* testified that he was in New York in the fall of 1833, found the market very bad, and let the *McLaughry's* have his butter to take south and sell. *Harkness* testified that he had butter on consignment, which he left with the *McLaughry's*, and they took it south; but he did not know they were going south when they took the butter. *Corbin* said he had dealt in butter several years; had sold for others in New York; has known of butter being sent to the south; that consignees frequently leave the butter in New York to be sold. He did not know that it was a general custom for persons having butter on consignment to send it abroad; it was most generally sold in New York; he knew no different custom in selling butter on consignment, or one's own butter. *Leal* said he had not known any custom of consignees sending butter abroad to sell. It was conceded by the plaintiff that the defendant had endeavored faithfully to dispose of the plaintiff's butter to the best advantage.

The defendant's counsel contended, and asked the judge to charge the jury: 1. That the defendant was liable only for fraud or gross neglect; that he was only bound to exercise ordinary attention and diligence; and if the jury believed that he had acted honestly and in good faith, and had bestowed ordinary attention and diligence in the sale of the

McMorris v. Simpson.

plaintiff's butter under the circumstances of the case, he was not liable; 2. That *trover* would not lie; that the plaintiff should have brought *a special action on the case*; and 3. That if *trover* did lie, no demand having been proved, the plaintiff could not recover. The judge held the law to be, and charged the jury, 1. That the defendant was bound to sell in New York, and not elsewhere; 2. That the defendant was liable, although he had been attentive and diligent in attempting to effect a sale of the plaintiff's butter, and had acted honestly and in good faith in sending it to the south with the *McLaughry's* for sale; 3. That *trover* would lie; and 4. That it was not necessary for the plaintiff to prove a demand of the butter; that sending it to the south for sale was of itself a conversion. The defendant excepted to each of these opinions, and the jury found a verdict for the plaintiff, which the defendant, on a *case* made, moves to set aside.

N. K. Wheeler, for defendant.

A. J. Parker, for plaintiff.

By the Court, BRONSON, J. I cannot see this case in so strong a light against the defendant as it was regarded by the judge on the trial. There was, at least, a fair question for the jury, which should not have been withdrawn from their consideration. The farmers in Delaware, instead of selling their butter at home, are in the habit of going to market themselves. Those who do not go, send by their neighbors, who receive a compensation for their services. The defendant received the plaintiff's butter to sell, with no other instructions or limit to his authority than that of *doing the best he could with the property, or doing as well by it as if it was his own*; with those instructions he literally complied. After making a faithful and diligent, though fruitless effort to sell in New York at what was deemed a fair price, he sent the plaintiff's butter, *together with his own* and his son's butter, to the south, to be sold by the *McLaughry's*. It is admitted that he acted with perfect good

McMorris v. Simpson.

faith, but it is insisted that he went beyond his authority in sending the property to another market, and entrusting it with another agent.

It is not improbable that both parties supposed the butter would be sold in New York, and that the defendant would himself make the sale; but no such qualification of the defendant's authority was directly proved, and whether it could be fairly inferred from the circumstances of the case was a question for the jury. It appears affirmatively that nothing was said by the plaintiff about the *place* where he wanted the butter sold, and it also appears that butter was frequently sent south for a market when sales could not be advantageously made in New York. But it is said that this was only done by the *owners* of property—not by *consignees* and *agents*. Now, what was the defendant's commission but a license to act as though he were the *owner*? The plaintiff says to him, "Do the best you can with my butter; do as well by it *as if it was your own*." And besides, one witness who had known butter sent south, added, that he knew no different custom in selling butter on consignment, or selling one's own butter.

Then, as to entrusting the property to a sub-agent, one of the witnesses says, that consignees frequently leave the butter in New York to be sold. The mere fact of appointing a sub-agent, therefore, was not against the usual course of this business. And besides such an appointment is the necessary consequence of sending to another market, for none of the witnesses say that the owner or consignee of the property goes with it to the southern market.

The extent of an agent's authority may be gathered from his instructions, and the usual course of the business about which he is employed. In this case, whether we judge from what was said between the parties at the time, or the nature of the employment, we cannot but see that the plaintiff intended to give the defendant a very large discretionary power. What inference the jury would have drawn from the matters proved, had the question been left to them, I will not attempt to conjecture, but they certainly would not have been bound to find that the defendant had

McMorris v. Simpson.

rendered himself liable by departing from his authority. There was, at the least, room for serious question, whether the facts proved would warrant the conclusion drawn by the judge, that the defendant was bound to sell in New York, and not elsewhere.

It is said that the judge should have been requested to submit the question to the jury. The case specifies several points made by the defendant's counsel, on which the judge was requested to charge in his favor. It is then added that the judge held *the law* to be, and charged the jury, 1. That the defendant was bound to sell in New York, and not elsewhere," &c. The counsel must have understood the judge as meaning to say, that there was no question of fact for the jury—that as matter of law, on the facts proved, the plaintiff was entitled to a verdict. The case of *Read v. Hurd*, 7 Wendell, 408, and *Fitzgerald v. Alexander*, 18 id. 402, are decisive on this point.

The question whether, in any view of the case, this action of trover can be maintained, was discussed on the argument, and as that point may arise on another trial, it will be proper to give it some consideration. The most usual remedies of a principal against his agent are the action of *assumpsit*, and a *special action on the case*; but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some *act* on the part of the agent—a mere *omission* of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a

Hartfield v. Roper.

conversion of the goods can be maintained. The following cases will be found to support these positions. *Lyeds v. Hay*, 4 T. R. 260. *Murray v. Burling*, 10 Johns. R. 172. *Yaul v. Harbottle*, Peake's Cas. 49. *Severin v. Keppell*, 4 Esp. R. 156. *Anon.*, 2 Salk. 655. *Packard v. Getman*, 4 Wendell, 613. *Bromley v. Coxwell*, 2 Bos. & Pul. 438. *Owen v. Lewyn*, 1 Vent. 223. *Catlin v. Bell*, 4 Camp. 183, was an action of assumpsit, but trover might, perhaps, have been maintained.

In the case at bar, if the defendant was limited to a sale in the city of New York, and not elsewhere, the delivery of the property to a third person to be disposed of in another market, would, I think, be a conversion. But there must be a new trial, on the ground that the case belongs to the jury.

New trial granted.

HARTFIELD vs. ROPER & NEWELL.

Where a *child* of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a *public highway* without any one to guard him, and is there run over by a traveller and injured, neither *trespass* or *case* lies against the traveller, if there be no pretence that the injury was *voluntary* or arose from *culpable negligence* on his part.

In an action for such injury, if there be *negligence* on the part of the plaintiff there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care *on the part of the parents or guardians* of the child furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult.

The same rule, it seems, would apply in an action by a *blind* or *deaf* man, or a person *non compos*, who, under similar circumstances, received an injury on a public highway.

For an injury to a child of the most tender age, an action may be brought in the name of the child. In *England* it seems it must be so brought, and that an action cannot be sustained in the name of the *parent*; whether that be the rule here, *quere*.

THIS was an *action on the case*, tried at the Oneida circuit in May, 1838, before the Hon. ROBERT MONELL, one of the circuit judges.

Hartfield v. Roper.

The suit was brought by the plaintiff William Hartfield, by his next friend, Gabriel Hartfield, for an injury sustained by being run over, as alleged, by the defendants, with a sleigh and horses, and having his arm broken. In March, 1836, the plaintiff, a child then of *about two years of age*, was standing or sitting in the beaten track of a public highway, and no person near him; the defendant *Roper* was driving a sleigh and horses upon the same road, and before the child was perceived the horses passed over him. He was discovered by Newell, the other defendant, who was in the same sleigh, and on his exclaiming that a child had been run over, the horses were immediately stopped by Roper and backed, and the sleigh prevented from passing over the child. The injury sustained was very serious; an arm of the child was broken, and he suffered greatly for about two months, and considerable expense was incurred in medical attendance. The sleigh was at the time of the injury descending a hill, at the foot of which was a bridge, and the child was in the road about 6 or 8 rods from the bridge. The course of the road was such that in descending the hill there was a fair view of the road beyond the bridge. A daughter of the defendant Newell, who was in the sleigh with her father, testified, however, that she did not perceive the child, although she sat on the side of the sleigh which passed over the track in which was the child. The defendant Roper had no sleigh bells. The horses at the time of the injury were trotting, but not at great speed; Roper sat on the front seat of the sleigh driving the horses, and Newell and his daughter sat on the back seat. The parties in the sleigh were not conversing at the time of the accident. The horses and sleigh belonged to Newell, but were let together with a farm and other property to Roper, for a term not expired at the time of the accident. It was proved that Newell was esteemed to be worth \$10,000. Upon the above facts the defendant's counsel moved for a *nonsuit*, which the judge refused to grant. A motion was also made that the jury should be instructed to acquit Newell on the ground that there was no evidence against him, so that he might be improved as a witness for Roper; which the judge refused to do. The

Hartfield v. Roper.

jury, under the charge of the judge, found a verdict against both defendants, with *five hundred dollars* damages. The defendants asked for a new trial.

J. A. Spencer, for the defendants.

W. Tracy & W. C. Noyes, for the plaintiff.

By the Court, COWEN, J. The injury to this child was doubtless a very serious misfortune to him. But I have been utterly unable to collect, from the evidence, any thing by which the jury were authorized to impute such carelessness as rendered these defendants responsible. It is true, they might have seen the child from the turn of the road in descending, had they looked so far ahead; but something must be allowed for their attention to the management of the horses and their own safety in descending the hill to a bridge. So unobserving were they in fact, that Mrs. Lewis, who sat in the rear of the sleigh, on the left side, and therefore in the best position of the three to overlook the road in its full extent, as far as the place where the child was, did not discern him. It was somewhat severe, in a case like this, to allow testimony of Newell's ability to pay, though it was not objected to. It seems to imply that he had been so brutal as silently to allow Roper's going on and endangering the child's life, after he, Newell, had discovered it to be in the road. But, perhaps, no objection can now be heard to that evidence having been received, because it was not made at the trial.

No doubt the action was properly brought in the name of the child. Nor is there any objection to its form, since the statute. 2 R. S. 456, § 16, 2d ed. Nor could the father have brought an action for loss of service, in respect to so small a child, according to the English case of *Hall v. Hollander*, 4 Barn. & Cress. 660; though I should think it quite questionable whether that case can be considered as law here. If the defendants were, in truth, so reckless of the child's safety, as to run over it, in the way described after knowing it to be in the road, the verdict is none too

Hartfield v. Roper.

large But such trifling with human life ought not to be presumed; and there was no proof of it, either direct or circumstantial. This is not a case, however, for interfering upon the ground of excessive damages.

✓ The only question which seems to be open for our consideration is, that of negligence. This respects both parties. It is quite necessary to drive at a moderate pace, and look out against accidents to children and others, in a populous village or city. See *M'Allister v. Hammond*, 6 Cowen, 342, and per Lawrence, J. in *Leame v. Bray*, 3 East, 597. But this accident happened in the country, where was a solitary house; a child belonging to it happened to be in the road, a thing most imprudently allowed by its parents, and what could have been easily prevented by ordinary care. Travellers are not prepared for such things. They, therefore, trot their horses. They are warrantably inattentive to small objects in the road, which they may be incapable of seeing in the course of a drive for miles through the country, among a sparse population. To keep a constant look out, would be more than a driver could do, even if he were continually standing and driving on a walk. Yet to this the matter must come, if he is to take all the responsibility. The roads would thus become of very little use in the line for which they were principally intended. It seems to me, that the defendants exercised all the care which, in the nature of this case, the law required. If so, it is a case of mere unavoidable accident; for which they are not liable. *Dygert v. Bradley*, 8 Wendell, 469, 472, 473. *Clark v. Foote*, 8 Johns. R. 421. *Penton v. Holland*, 17 id. 92.

✓ Was the *plaintiff* guilty of negligence? His counsel seemed to think he made a complete exception to the general rule demanding care on his part, by reason of his extreme infancy. Is this indeed so? A snow path in the public highway, is among the last places in this country to which such a small child should be allowed to resort, unattended by any one of suitable age and discretion. The custody of such a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed in the road, as this child was, with-

Hartfield v. Roper.

out gross carelessness. It is the extreme of folly even to turn domestic animals upon the common highway. To allow small children to resort there alone, is a criminal neglect. It is true that this confers no right upon travellers to commit a *voluntary injury* upon either ; nor does it warrant *gross neglect* ; but it seems to me that, to make them liable for any thing short of that, would be contrary to law. The child has a right to the road for the purposes of travel, attended by the proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion, which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled, that, if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels, *Rathbun v. Payne*, 19 Wendell, 399, *Burcle v. N. Y. Dry Dock Company*, 2 Hall, 151, which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveller or for the purpose of pursuing his sports. The application may be harsh when made to small children, as they are known to have no personal discretion, common humanity is alive to their protection ; but they are not, therefore, exempt from the legal rule, when they bring an action for redress ; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose ; and in respect to third persons, his act must be deemed that of the infant ; his neglect, the infant's neglect. Suppose a hopeless lunatic suffered to stray by his committee, lying in the road like a log, shall the traveller, whose sleigh unfortunately strikes him, be made amenable in damages ? The neglect of the committee to whom his custody is confided

Hartfield v. Roper.

shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above all law? An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wendell, 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria*. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers, and then harrass them in courts of justice, recovering heavy verdicts for his own misconduct.

The counsel for the plaintiff probably have the advantage of saying that the neglect of an infant has not, in any reported case, ever been allowed by way of defence in an action for negligently injuring him. But so far, there is an equal advantage on the other side. The defence has not been denied in any book of reports. The defendant has also another advantage. The reports expressly say that negligence may be predicated of an infant or lunatic. All the cases agree that trespass lies against an infant. That was adjudged in *Campbell v. Stakes*, 2 Wendell, 137, and *Bullock v. Babcock*, before cited. And it is equally well settled that where an injury is free from all negligence, as if it arise from inevitable accident, there trespass does not lie.

Weaver v. Ward, Hob. 134. Marcy J. in *Bullock v. Babcock*, 2 Wendell, 393. *Dygert v. Bradley*, before cited. The cases maintaining trespass against an infant, therefore, imply that he may be guilty of negligence. Trover will also lie for a mere non-feasance, e. g. a non-delivery of goods, where they do not come to the infant's hands by contract. Lawrence, J. in *Jennings v. Rundall*, 8 T. R. 337. *Campbell v. Stakes*, 2 Wendell, 143. The cases most favorable to infants all agree in that. And so, where the contract of bailment to an infant has expired, it was agreed that, on

Hartfield v. Roper.

non-delivery, the owner may maintain detinue, replevin, or trover. *Penrose v. Curren*, 3 Rawle, 351. And see per Rogers, J. id. 354. It was said trespass lies against an infant though only four years of age: 25 Hen. 6, 11 *b.* per Wangford, though this is put by Brook with a *quere.* Br. Abr. Corone, pl. 6. No doubt, however, he may bring a suit at any age; and if that suit depends upon a condition on his side, he must show that it was performed. It was said in *Stowell v. Zouch*, Plowd. Com. 364, if an infant lord, who has title to enter for mortmain, does not enter within the year, he shall be bound by his laches; "for there he had but title to a thing which never was in him." To warrant an action he must have entered within the year; and not having done so, he could have no remedy. Several like instances are put in the same page, which are also collected and arranged in 9 Viner's Abr. *Enfant*, (B. 2,) pl. 7, 8, p. 376, of the octavo ed. But it is plain in the nature of things, that, if an infant insist on a right of action, he must show a compliance with the conditions on which his right is to arise and this is entirely irrespective of his age. Land descends to an infant of a year old; and he is bound to make a share of the partition fence. He neglects to do so, whereby his neighbor's cattle enter and trespass upon the land. No one would think of contending that his neighbor, must, therefore, be deprived of his defence. The infant has neglected to fulfil the condition, on which he could sue, or his guardian has done so, which is the same thing. He might as well sue because his neighbor had left a gate on his own premises open, through which the infant had crept, and fallen into a pit and hurt himself. The man has a right to keep his gate open; and the child's parents must keep him away. But one has no plainer right to walk about his own premises, and open and shut his own gates, than he has to travel in the highway with his horses. An infant creeps into the track from your field to your barn, and is injured by your driving a load of hay along the path, are you to be deprived of all excuse in an action for the injury?

Hartfield v. Roper.

The argument for this plaintiff goes quite too far and proves too much. It was said that drivers are bound to suppose that small children may be in the road, and as all the care lies on the side of the former, damages follow of course for every injury to the latter. Suppose an infant suddenly throws himself in the way of a sleigh, a waggon or a rail road car, by which his limb is fractured; it may be said with equal force, he is incapable of neglect. So if he be allowed to travel the road alone in the dark. The answer to all this is, the law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents; and if there be any legal responsibility in damages, it lies upon them. The illustration sought to be derived from the law in respect to the injury of animals turned or suffered to stray into the street, does not strike me as fortunate. If they be there without any one to attend and take care of them, that is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention on the side of the traveller. Indeed, it could rarely be said that animals entirely unattended are lawfully in the roads or streets at all. They may be driven along the road by the owner or his servants; but if allowed to run at large for the purpose of grazing, or any other purpose, entirely unattended, and yet travellers are to be made accountable in all case of collision, such a doctrine might supersede the use of the road, so far as comfort or expedition is concerned. The mistake lies in supposing the injury to be wilful, to arise from some positive act, or to be grossly negligent. Such an injury is never tolerated, be the negligence on the side of the party injured what it may. *Clay v. Wood*, 5 Esp. R. 44. *Rathbun v. Payne*, before cited. But where it arise from mere inadvertence on the side of the traveller, he is always excused by the law on showing that there was equal or greater neglect on the side of his accuser. It is impossible to say, then, that the accuser was not himself the author of the injury which he seeks to father upon another. My difficulty in the case at bar is to find the least color for imputing gross negligence, or indeed any degree of negligence to the defendants. But if there were

Hartfield v. Roper.

any, there was, I think, as much and more on the side of the plaintiff.

It therefore seems to me, that here was a good defence established at the trial, on the ground that the defendants being free from gross neglect, and the plaintiff being guilty of great neglect on his part, indeed being unnecessarily, not to say illegally occupying the road, having no right there, (for he does not appear to have been travelling, nor even on the land which belonged to his family,) the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others.

Again; I collect from the evidence that Newell had demised the team for a term of two years, which was unexpired at the time of the injury, to his son-in-law and co-defendant Roper. Newell then had no control of the team, and cannot be made liable without proof of positive and active concurrence in the injury, a thing for which there is no pretence in the proof, and which implies a barbarous temper, which the law cannot presume in any one. He, at least, should have been acquitted by the jury. He neither actually participated in the management of the team, nor could his interference have been legally efficient to prevent mischief. He had no lawful control of the horses. Roper was the exclusive owner *pro hac vice*.

The evidence, at the time when the motion was made to allow the jury to pass upon the case of Newell, had made out nothing actual against him, if Roper, the driver, may be said to have been implicated as a wrong-doer. But Newell might, at this stage, perhaps have been regarded by the jury as owner of the horses, and Roper as his servant. The lease was not in proof. Constructively, his liability would follow from the neglect of his servant; and in this view it cannot be said there was no evidence against him. It is only where the evidence totally fails as to one whose case can be separated from the other, that he is entitled to be acquitted for the purpose of being sworn as a witness for his co-defendant.

The motion for a nonsuit, which followed, seems to have been the more proper one; for I have been utterly unable

Franklin v. Smith.

to see that, so far, the evidence had made out any neglect, or the semblance of neglect on the part of the defendants, while it had established clear neglect on the other side. But this question has been sufficiently dwelt upon in connection with the defendant's proofs, and that which the plaintiff adduced at the close of the cause. It was enough, if the cause of action was then made out, although the judge might have refused to nonsuit. It appears to me it was not.

It follows that a new trial should be granted. The costs should, I think, abide the event; for the judge erred in omitting to nonsuit the plaintiff. The case was certainly not made better for the plaintiff by the subsequent evidence. It is not, therefore, *merely* the case of a verdict against the weight of evidence, which calls for payment of costs.

New trial granted; costs to abide the event.

FRANKLIN vs. SMITH.

An action does not lie against a *notary* for the omission of notice of protest to an endorser, where the holder may resort to other grounds for fixing the endorser independent of the notice, and wilfully or negligently omits to avail himself of such facts.

It seems, however, that in such case, the holder of the note should not only be well apprised of the existence of the facts to which resort might be had to sustain the action against the endorser, but he should have some intimation that the validity of the notice would be questioned.

ERROR from the New York common pleas. Smith sued Franklin in an action on the case for negligence in omitting as a *notary* to give notice of the non-payment of a note, whereby the plaintiff alleged he had lost his remedy against the endorser. The defendant, besides adducing evidence for the purpose of establishing the fact that notice of protest was duly given, proved an arrangement between the *maker* and *endorser* of the note, whereby the latter had assumed the payment of the note, and urged that in consequence thereof the endorser was not entitled to notice of non-payment, and proved that the plaintiff was apprised of

Franklin v. Smith.

such arrangement. The question whether the plaintiff was fully advised of the arrangement, so that he might have availed himself of it, in answer to the objection of want of notice of the non-payment of the note in the action against the endorser, was with the other questions arising in the cause submitted to the jury, who found a verdict for the plaintiff. The defendant sued out a writ of error upon a bill of exceptions presenting the above question, besides several others, which will not here be noticed. The case was argued by

C. O'Goner, for the plaintiff in error.

G. Greenwood, for the defendant in error.

By the Court, NELSON, Ch. J. It is clear upon principle, and not without authority, (*vide Van Wart v. Woolley*, 3 Barn. & Cress. 439; 5 Dowl. & Ry. 374; 5 Maule & Sel. 62; and 1 Barn. & Cres. 10,) that if the plaintiff sustains no loss, or need not sustain any with ordinary attention to the case, notwithstanding a defective notice of protest, the notary is not liable to him; and if he is fully advised of a ground of sustaining the action against an *endorser* independently of the notice, and wilfully or negligently omits to avail himself of it, he cannot subsequently sustain an action against the notary. But this ground of supporting the action against the *endorser* should be not only well taken, but well known to the plaintiff; and it seems to me also that he should have some intimation that the *notice* would be questioned, so that he might come prepared to resort to the other aspect of the case. In the absence of such intimation, he might, I think, put himself upon the simple ground of notice, assuming that the officer had done his duty. In this respect, I am inclined to think the case was more favorably for the defendant submitted to the jury than can be upheld by the strict principles of law.

Judgment affirmed.

Fay's adm'rs v. Richards.

FAY'S ADMINISTRATORS vs. RICHARDS & HAYWOOD.

In an action upon a *promissory note* given in pursuance of a *covenant*, the maker cannot impeach the consideration, the covenant being a good and sufficient consideration; but if within the equity of the statute allowing the consideration of a *sealed instrument* to be inquired into, the maker cannot avail himself of the defense, unless he has pleaded it or given notice thereof. Where a party obtains what he contracted for, he cannot avoid his contract on the ground that what he received is *valueless*, unless he shows *fraud* or a *misapprehension* in respect to the subject matter of the contract.

THIS was an action of *assumpsit*, tried at the Oneida circuit in October, 1836, before the Hon. HIRAM DENIO, then one of the circuit judges.

The action was on a promissory note dated February 2, 1833, by which the defendants promised to pay the intestate \$150, in three instalments, with interest from December 22, 1832. The defence was that the note was without consideration. On the 22d December, 1832, *Lyman* and *Clark Richards* of the one part, and *Jonas Fay*, the intestate, of the other part, entered into sealed articles of agreement, by which L. and C. Richards agreed to pay Fay \$150 in three instalments, with interest, and to give *satisfactory security* for the performance; and thereupon Fay agreed to release to L. and C. Richards *all his interest* in and to lot No 40, in the north west part of the Oneida reservation, *being* a contract from John Knowles to deliver Fay the original certificate for the lot. [The lot had been purchased by Knowles from the state, and he had received a certificate of the purchase, entitling him to a conveyance on paying the balance of the purchase money.] It was unequivocally understood (the contract stated) that C. and R. Richards made the purchase subject to all the demands *the state* had against the lot for the purchase money, back interest, taxes, and for draining the swamp. On the 2d February, 1833, C. Richards, in pursuance of the contract, made the note in question, with Haywood as his surety. The defendants offered to prove that on the 11th Decem-

Fay's adm'rs v. Richards.

ber, 1832, *eleven days* before making the contract to purchase from Fay, the lot was conveyed by the comptroller to the people of this state, the same having previously been sold for taxes, and not having been redeemed. The defendants further offered to prove, that on the 30th April, 1833, the lot was sold by the surveyor general pursuant to law, and a certificate of sale given to the purchaser. The circuit judge excluded the evidence offered, the defendants excepted, and the jury found a verdict for the plaintiffs. The defendants moved for a new trial.

J. A. Spencer, for defendants.

C. P. Kirtland, for plaintiffs.

By the Court, BRONSON, J. The note was made in pursuance of the covenant to give security. This was a good consideration, and the defendants can make no question as to the *consideration*, without going back to the sealed contract, and impeaching the consideration upon which that was founded. This they could not do at the common law, and the statute only extends to two cases: first, where there is an "action upon a sealed instrument," and second, "where a set-off is founded upon any sealed instrument." 2 R. S. 406, § 77. This case is not within the letter of the statute; it is not an "action upon a sealed instrument." It may, however, come within the equity of the statute; but then the difficulty is, that the defendants have not pleaded or given notice of this defence; and without doing so, the statute declares that the defence "shall not be made." § 78. I do not see how this difficulty can be got over.

But had the evidence been received, it would not have made out a defence. The fact that the lot had been sold by the surveyor general *after* the making of the contract and the giving of the note, is of no importance; it has no tendency to prove that the note was without consideration at the time it was made. Then how does the case stand? *Knowles* had purchased the lot and taken a certificate from the state, which he had agreed to transfer to Fay. Fay agreed

 Allen v. Jaquish.

to release all his interest in the lot—specifying what that interest was—to C. and L. Richards; and for such release, they agreed to pay the money in question. 'There was no fraud; not even an offer to show that either or both of the parties contracted under a misapprehension in relation to the true state of the title. For aught that appears, C. and L. Richards knew at the time that the land had been sold for taxes, and that the comptroller had a few days before conveyed to the state. They may have been willing to pay \$150 for the original certificate of sale to Knowles, in the hope that the state would relinquish its title under the tax sale, on payment of the arrearages and interest. Favors of this kind have been granted by the state to the owners of land sold for taxes. I do not see how the consideration can be impeached without showing fraud on the part of Fay, or at least, that C. and L. Richards supposed they were purchasing something which they did not acquire.

New trial denied.

 ALLEN vs. JAQUISH.

A contract *not under seal*, rescinding a specialty, where such contract is fully executed and carried into effect, is valid. So a contract under seal cannot be set up in bar of a recovery, on an implied promise to pay for work done, stipulated for in the contract, but performed at a time and in a manner different from its provisions, *accepted* however by the other party; but a *specialty* cannot be modified by a *parol* or *written unsealed executory* agreement.

It was accordingly held, that a subsequent *unsealed* agreement, to relinquish upon failure to perform certain stipulations, a lease duly executed *under seal* for a term of years, was inoperative as a *defeasance*, but valid as a contingent *surrender*, the latter being deemed a conveyance *in presenti*, to take effect *in futuro*.

It is not indispensable to the validity of a contract, that the cause moving to the act should be *mentioned as the consideration*; it is enough if from the whole instrument it be manifest that there is a consideration.

Notice to quit is not necessary, where the terms upon which a lease is to terminate are fixed by the agreement of the parties.

THIS was an action of ejectment, tried at the Delaware circuit in May, 1837, before the Hon. JAMES VANDERPOEL, then one of the circuit judges.

Allen v. Jaquish.

On the 25th August, 1834, an agreement *under seal* was entered into by the plaintiff and *John Jaquish, junior*, whereby the plaintiff bound himself to furnish a mill on a certain stream and as much timber as could be cut and sawed into lumber and manufactured into shingles by Jaquish *during ten years* next ensuing the date of the agreement, from certain specified lots; to keep the mill in repair, and within one year to make a good road from the mill to the river *Dela-ware*—giving by the agreement *immediate possession* to Jaquish of the mill, mill-lot and house, and authorizing him to clear as much land as he saw fit. Jaquish on his part agreed to erect *two shingle machines* and put them in operation in the mill by the *1st June*, 1835, to keep them in repair or supply their places, and to saw as much lumber and manufacture as many shingles as could be made during the stipulated time: for which privileges he agreed to leave at the mill *one-third* of all the lumber and shingles which should be manufactured. By an agreement endorsed on the above instrument, the plaintiff authorized Jaquish to have a *jack* made at the expense of the plaintiff. In October, 1835, another agreement in writing, but *not under seal*, was signed by John Jaquish, jun. whereby, after reciting the former agreement on his part to put up two shingle machines in the mill of the plaintiff, he stipulated as follows: “I do hereby engage, if I do not put up the said shingle machines in the said mill and get them in operation by the first day of June, 1836, I will then *relinquish the contract* and give up every thing I have done, and leave all things on the premises, provided I shall be entitled to receive two-thirds of all the lumber sawed at the mill until the said first of June, 1836.” The shingle machines not being erected and put into operation by the first day of June, 1836, the plaintiff caused a *notice to quit* to be served on *John Jaquish, jun.* on the *tenth* day of June. A similar notice having two days before been served upon *Cornelius Jaquish* and *John W. Jaquish*, who were made defendants *jointly* with John Jaquish, jun. in this action, which was commenced shortly afterwards; the declaration being returnable at July term, 1836.

The plaintiff having rested, the defendant's counsel asked for a nonsuit on the following grounds: 1. That the suit

Allen v. Jaquish.

was prematurely brought under the notice to quit ; 2. That the plaintiff had failed to show performance of the stipulations on his part as contained in the contract, as to the making of a good road, &c. ; 3. That there was no proof of a *joint* possession of the premises by the defendants in the action ; and 4. That the second agreement was void, being without consideration and not sealed. The judge refused to nonsuit the plaintiff. The defendants then offered to prove non-performance of sundry stipulations in the contract on the part of the plaintiff ; which evidence being objected to, was rejected by the judge. The evidence of a *joint possession* of the premises by the defendants resting in circumstances, the counsel for the defendants asked the judge to require the plaintiff to *elect* against which of the defendants he would proceed, insisting that a *joint possession* had not been shown, or to nonsuit the plaintiff. The judge refused to do either. Whereupon the cause was summed up and the jury found a verdict for the plaintiff against all the defendants ; who now moved for a new trial.

A. J. Parker, for the defendants.

M. T. Reynolds, for the plaintiff.

By the Court, COWEN, J. [After ruling *against* the defendants the minor objections raised in the case : such as that a *joint possession* was not shown in the defendants, and that the evidence offered of non-performance, by the plaintiff of the stipulations in the first contract on his part agreed to be performed ought not to have been rejected, the judge proceeded as follows :] The *second agreement* was, I think, *valid*. One objection raised on the argument was, that the agreement not being under seal, it should have expressed a consideration. It was evidently intended as a modification of the first agreement or lease. It was signed by the defendant, John Jaquish, jun. the original lessee, and accepted by the plaintiff on account of the delay and non-performance ; perhaps, of both parties. John Jaquish, jun. deeming himself most in fault, agreed, on ac-

Allen v. Jaquish.

count of his non-performance, mentioned in his second agreement, to repair the omission by a given day, or relinquish his original lease. He meant the last contract should operate as a part of the first; and the motive or consideration is plainly enough collectable from the face of the new contract. He was to have a share of the lumber sawed at the mill in the mean time, and the plaintiff had been damaged by the breach. Here are two concurring considerations, the satisfaction of damage to the plaintiff, and a clear right or benefit acquired by John Jaquish, jun. It was not necessary that these should be expressly mentioned as the consideration. It is enough that they are obviously so in fact, from the recital and nature of the instrument.

If the lease became void, in consequence of not fulfilling the second agreement, or, if the latter operated as a *surrender*, the case was not one in which any notice to quit was necessary. That is never required where the parties have by mutual agreement fixed the terms on which the lease is to terminate. The lessee may always waive the right to require notice; and for the same reason, the right never arises where a lease for years expires by its own limitation, or the parties have otherwise made an end of it. *Conventio vincit legem*. If a party has, in any form, transferred all his interest to another, he is bound to quit the possession. If he do not, an ejectment lies against him immediately.

The important question is, in what way did the second writing between these parties operate? Did it enure as a mere promise, a defeasance, or modification of the lease; or was it a surrender? If a mere promise, ejectment will not lie upon it; but only an action of *assumpsit*. To warrant the present action, therefore, it must have operated to extinguish the lease, or pass the interest of the lessee to the plaintiff.

There is no doubt that the parties intended the second instrument as a defeasance; but I think they failed in the attainment of that object. The instrument is not under seal; and for that reason, it is impossible, without a departure from a long line of direct and unbroken authority, to give it effect as a modification or defeasance of the lease,

 Allen v. Jaquish.

which was sealed by both parties. The cases of *Lattimore v. Harsen*, 14 Johns. R. 330, and *Dearborn v. Cross*, 7 Cowen, 48, are relied on as showing that a specialty may be modified by a simple contract between the parties. If these cases be maintainable, and I think they are, it must be on some other ground: perhaps that of a contract for rescision, executed and fully carried into effect; not on the simple idea of modification by a parol contract executory. And they were so regarded in the subsequent cases of *Snydam v. Jones*, 10 Wendell, 180, 184, *Barnard v. Darling*, 11 id. 28, 30, and *Delacroix v. Bulkley*, 13 id. 71, 75. In these, we have Mr. Justice Sutherland, Mr. Justice Nelson, and Chief Justice Savage, successively disavowing the doctrine that parties can modify their agreements under seal, by any subsequent agreement without seal. And any one will feel clear, on an examination of the books, that these learned judges could have done nothing less, without a rash disregard of the very highest and best evidence which we have of the law. They adverted to the authorities, at the pages which I have cited. The same authorities, or nearly the same, will be found cited and approved in the following books: 1 Phil. Ev. 563, 7th Lond. ed.; id. 774, 8th Lond. ed. by Amos & Phillippis; *Creig v. Talbot*, 2 Barn. & Cress. 179. In *Braddick v. Thompson*, 8 East, 344, 346, it is said, "all the court were satisfied, that the defendant could not plead a collateral agreement by *parol*, to invalidate a claim arising upon deed." It is the same whether the collateral agreement be in writing or not; for "in the classification of contracts, an agreement *in writing* not under seal, is denominated a parol contract." That was said in *Ford v. Campfield*, 6 Halst. 327, which may be added as another case in point to the question now before us. *Sinard v. Patterson*, 3 Blackf. 353, 357, is also in point. There Blackford, J. said: "There is no principle of the common law better settled, than that an agreement under seal can only be dissolved *eo ligamine quo ligatur*." There are certainly several *dicta* to the contrary; some emanating from learned judges of this court, which led Mr. Justice Nelson to observe, in *Barnard v. Darling*, that the cases seemed to

Allen v. Jaquish.

have left the doctrine in a little obscurity and doubt. That is, indeed, true; nor are we without direct authority against it. *Deshazo v. Lewis*, 5 Stew. & Port. 91. Most of the cases, however, supposed to bear against it, go no farther than to say, that where the agreement under seal is departed from in the mode or time of its performance, and yet the performance is accepted as satisfactory, although an action of *covenant* will not lie, the acts of the parties shall be considered as evincing an executed agreement to rescind the covenant. The person sought to be charged having acceded to the departure, and equity, conscience, and good faith, therefore, demanding that he should make compensation, the law raises an implied promise to pay. Such was the case of *Jewell v. Schroepfel*, 4 Cowen, 564, and numerous other cases which are quite familiar to the profession. See *Munroe v. Perkins*, 9 Pick. 298. The action is purely equitable, being the same in principle as that for money had and received. What effect the acceptance of an imperfect performance as a substitute for a literal one, would have upon an action for a breach of the covenant itself, has not, that I know, been adjudged. In *Jewell v. Schroepfel*, it appears there had been a recovery in a cross action for the breach. But why should not an actual performance and acceptance of the substituted performance operate as an accord and satisfaction? The inquiry, however need not be pursued.

The whole doctrine as to the effect of the instrument now in question, by way of modifying the lease, indeed of defeasances generally, will be found in Shep. Touch. 396, ch. 22. The very learned author of that book agrees, that all executory contracts, among which he includes leases for years, may be annulled by a defeasance, which he says may be and usually is executed subsequent to the instrument which it is intended to defeat. But then he lays down the requisite, without qualification, "that the defeasance be made *eodem modo*, as the thing to be defeated is created; for if the obligee by *word only* discharge the obliger, or grant not to sue him, this will not defeat the obligation; it must be by deed therefore as the former was." By adopting the au-

Allen v. Jaquish.

thor's remarks, we take the most favorable view for the plaintiff in the case at bar; for the author tells us in the same chapter, that a defeasance subsequent is confined to contracts executory; whereas, contracts executed can be touched only by a defeasance cotemporary with the original deed, and making a part of it. It is well known that in the time of Mr. Justice Doderidge, to whom the Touchstone is ascribed, leases for years had not entirely ceased to be considered as merely executory contracts, defeasible by the lessor in despite of the lessee. Since they have come to be regarded more as contracts executed, and carrying an interest in possession, it may be well doubted whether a defeasance subsequent may be predicated of them. In *Creig v. Talbot*, where sealed bonds of submission to arbitrators were held capable of a modification by a sealed contract subsequent, postponing the time of hearing, Holroyd, J. said, "The distinction is between things vested and things executory, as in a feoffment of lands. There the estate is vested in the feoffee, and therefore the condition is void. But a bond is executory, and may be defeated at any time by deed, although not executed at the same time with the bond. Again; the second agreement of Jaquish is not expressed so as very clearly to declare that the lease should be void, if the machines were not completed by the time. He merely agrees thus: "If I do not put up the said shingle machines, &c., by the 1st day of June, 1836, I will then relinquish the contract, [lease,] and give up every thing," &c. Taking the whole together, however, if it had a seal, I agree we should regard it as indicating an intent that a failure should operate as a defeasance, and then we might possibly give it effect accordingly. But the want of a seal is an insurmountable obstacle. When the time came, the lessee refused to surrender the premises, and kept possession.

The second agreement thus failing to operate as a defeasance, the next question is, whether it could operate as a *contingent surrender*, it being in the nature of a re-demise. There is no doubt that either a surrender or demise may be effected by a simple writing not sealed. *Magennis v. McCullogh*, Gilb. Eq. Cas. 235, 6. Co. Litt. 338, a. note (1).

 Allen v. Jaquish.

Farmer v. Rogers 2 Wils. 26. The operative words of a surrender are, "hath surrendered, granted and yielded up." 2 Black. Comm. 326. Co. Litt. 337, b. Woodf. Land. and Ten. 185, Lond. ed. of 1804. There is no doubt, however, that a surrender may be effected by equivalent words; and when complete it is as it were a *re-demise*. Woodf. Land. and Ten. ed. before cited, 186. Perk. § 607. It may be made upon condition; that is, to become void upon condition. Perk. § 624. And though no case goes so far as to say that a surrender may be made to become good upon condition precedent, yet there seems to be no objection to that in principle, if the interest surrendered be not a freehold. That cannot in general be granted so as to take effect *in futuro*; but a term for years can. The surrender of a term to operate *in futuro* is equally free of the objection. Contracts of parties, whether by deed or otherwise, shall always take effect according to their real intent, if that be possible consistently with the rules of law. In *Whitlock v. Horton*, Cro. Jac. 91, Mary Milton, by indenture between her and the defendant, covenanted, granted and agreed, that the defendant should and might, have, hold and enjoy, from and after the death of E. W., the moiety of certain lands for sixty years, &c. And it was held that these were apt words to make a lease for years, and might enure as a lease *in futuro*. *Richards v. Sely*, 2 Mod. 79, is a like case. And there, Maynard, Serj. conceded that the word "covenant" would of itself make a lease, which is adopted and repeated in Woodf. Land. and Ten. 7, Lond. ed. 1804. The latter author, at p. 6, says it is a general rule, "that whatever words are sufficient to explain the intent of the parties, that one shall divest himself of the possession, and the other come into it, for such determinate time, whether they run in the form of a license, covenant or *agreement*, are of themselves sufficient; and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose. Otherwise of the most apt words, if they appear to be only preparatory to a future lease to be made. Bac. Abr. Leases, &c. (K), S. P. We have seen that Wood-

North's adm'rs v. Pepper.

fall, in another place, speaks of a surrender operating as of the nature of a *re-demise*. Suppose the owner of land promises another in writing, for good consideration, that on the other paying so much, he, the owner, will relinquish and give up the land to the promisee for ten years at such a rent. Is there a doubt, that on paying the money, the promisee might enter or bring ejectment as a lessee? I should think not. The case at bar is quite as strong; for the lessee agrees that if he fail to perform, he will relinquish his lease and give up every thing. No farther act is spoken of. The meaning was to annul and render the lease inoperative: and although it could not enure as a defeasance or as a demise, yet it may, I think, enure and take effect as a surrender, on the contingency happening. Test the case by the rule in Woodfall. Can any one doubt that the lessee intended to divest himself of the possession, and let the lessor take it for the whole remaining term of the lease? In this view the verdict at the circuit is sustainable, and a new trial must be denied.

New trial denied.

NORTH'S ADMINISTRATORS vs. PEPPER.

Where there is a covenant for the sale and purchase of a farm, the conveyance to be made and the consideration to be paid at a *future day*, if previous to the stipulated day the *purchaser* gives notice to the *vendor* that he has made up his mind to abandon the contract and not accept a deed, it is enough to support an action of covenant by the vendor to allege such notice, and it is not necessary in such case to aver a *tender* of a deed or *readiness to perform*.

In an action against the purchaser, the averment of the execution of a deed, notice to the purchaser and a demand of performance on his part is equivalent to an averment of *tender* of the deed.

It seems, that in such cases it is only necessary to aver a *readiness to perform*, and that a *tender of the deed* need not be alleged.

Nor is it necessary that the plaintiff should allege that he had *title* to the premises agreed to be conveyed; if such defence exists it must be shown by plea.

North's adm'rs v. Pepper.

DEMURRER to declaration. The plaintiffs in the *first* count of the declaration set forth an agreement under seal between the intestate, *Robert North*, and the defendant, *Elijah Pepper*, bearing date 15th December, 1837, whereby the intestate agreed to sell and convey to the defendant a farm for the sum of \$3200, and that *on the first day of May*, then next, he would execute to the defendant a proper conveyance of the farm in fee, containing a general warranty and the usual full covenants; and the defendant agreed on the first day of May, on the execution of the conveyance, to pay the above sum. For the faithful performance of which agreements, the parties bound themselves each to the other, in the sum of \$500, which were declared *liquidated damages*. The plaintiffs aver that on the sixth day of *January*, 1838, the defendant gave notice in writing to the intestate, that *he had made up his mind not to take his farm*, and that the defendant had ever since wholly failed to perform the agreement on his part, and had not paid the liquidated damages. In the *second* count after setting forth the agreement, the plaintiffs aver that the intestate in *his lifetime* executed a conveyance in fee of the farm to the defendant, containing the covenants as specified in the agreement; and the intestate in *his lifetime*, and the plaintiffs his administrators, *since his death*, had the deed *ready to be delivered* to the defendant *on the first day of May*, 1838, and ever since, on receiving from the defendant the contract price; and that the intestate in his lifetime, and the plaintiffs, administrators as aforesaid, since his death *have at all times been ready and willing* to perform and fulfil all things in the agreement contained, on the part of the intestate to be performed and fulfilled, and to execute and procure to be executed, such conveyance on the first day of May, 1838, and since on receiving the contract price; and although the defendant had notice of the premises and was requested by the intestate in his lifetime, and by the plaintiffs, administrators as aforesaid, since his death, to pay the said sum of \$3200 upon the execution of such conveyance, yet the defendant had not paid the said sum of \$3200, nor the sum of \$500. The plaintiffs then allege the *granting of letters of*

North's adm'rs. v. Pepper.

administration to them, on the thirteenth day of April, 1838, and conclude in the usual form. To this declaration the defendant interposed a general demurrer, and assigned as special causes, the following: 1. That it is not alleged in the first or second count that the intestate or his heirs, &c. were the owners of the premises to be conveyed, and had good right to convey; 2. That it is not alleged in the first count that the intestate or his heirs, &c., have at any time been ready and willing to perform the agreement; 3. That the second count is incongruous, in stating that the intestate had the deed ready to be delivered on the first day of May, and that letters of administration were granted to the plaintiffs on the thirteenth day of April preceding; and 4. That the plaintiffs show no authority in themselves to deliver the deed after the death of the intestate, nor allege any matter showing why the title to the premises, the subject matter of the agreement, on the death of the intestate did not descend to his heirs at law.

H. Swift, for the defendant.

H. M. Romeyn, for the plaintiffs.

By the Court, NELSON, Ch. J. In the first count there is no averment of a tender of the deed, or readiness to deliver it; but it is averred that before the first day of May, to wit, on 6th January preceding, the defendant by writing gave notice to the plaintiff that he had determined not to take his farm; had abandoned the agreement and refused to perform, &c. Upon well settled rules of pleading, this dispensed with an offer or readiness to perform on the part of the plaintiff, as it showed that such step would have been but an idle ceremony. 1 Chitty, 318. Dougl. 684. 1 T. R. 683. 5 Cowen, 506. Conceding that the defendant might recall this discharge of performance before the time for the execution of the deed, he must set it up by way of plea; or on a denial of the alleged rescindment, he might, I think, give it in evidence at the trial, and thus disprove the discharge in legal effect. But unless he avails himself of the

North's adm'rs v. Pepper.

locus penitentiæ in some way, it is clear that proof of the averment in the declaration would dispense with performance on the part of the plaintiff.

The second count avers the execution of a deed agreeably to the terms of the covenant, ready to be delivered to the defendant at the stipulated time; also that notice was given to him, demand of the money and refusal. This is abundantly sufficient, as it is substantially an averment of a tender, and refusal to perform. The better opinion seems to be, that it is enough to aver a *readiness to perform*, as under it an *actual tender* would be required in proof, if essential to maintain the action. *Rurson v. Johnson*, 1 East, 203. 2 Bos. & Pull. 448. 1 Saund. 320, (c). 2 id. 352, (z). 1 Chitty, 318. 5 Johns. R. 179.

It is said the plaintiff, in cases like this, should aver title in himself at the time of conveyance. This has been done here, if the covenant on the part of the intestate implies so much. Besides, the defendant may raise the question by putting in the proper plea. 17 Wendell, 376.

It is further urged, that the readiness to deliver the deed *by the plaintiffs*, who are administrators, as set forth in the second count, shows no authority on their part to deliver it. This averment, as it respects the plaintiffs, may be rejected as surplusage, as the count is complete without it; the testator having done every thing necessary to give the right of action.

Judgment for plaintiff.

Howes' ex'r v. Woodruff.

HOWES' EXECUTOR *vs.* WOODRUFF.

An agreement in writing entered into in 1822, to pay a sum certain with interest from 1 July, 1816, after deducting therefrom all equitable set-offs; the parties stipulating at the same time, when it should be convenient to make a final settlement, that the agreement then entered into might be taken up by giving a judgment at the option of the debtor, will not support an action either upon the *original indebtedness*, or upon the *new obligation* where the creditor does not commence his suit until after the lapse of six years and a plea of the *statute of limitations* is interposed.

THIS was an action of *assumpsit*, tried at the Livingston circuit in March, 1836, before the Hon. ADDISON GARDNER, then one of the circuit judges.

The defendant pleaded non-assumpsit and *the statute of limitations*. The plaintiff gave in evidence a paper signed by the defendant as follows: "August 6, 1822. This day settled with John Van Fossen, one of the executors of Wm. Howes, deceased, and found due the estate of said Howes, as appears from the books and papers in the hands of said executor, \$340 35 and interest from July 1, 1816, which I agree to pay said Van Fossen, after deducting therefrom the amount of such equitable accounts or offsets as I may have against said deceased." On the back of this paper was an endorsement signed by both parties as follows: "It is hereby agreed, that whenever it is convenient to make a final settlement of the account for which the within note was conditionally given, that the said note may be taken up by giving a judgment at the discretion of the signer." On the 28th and 29th of December, 1835, the plaintiff presented these papers, together with various papers said to be the basis of the account on the part of the estate, to the defendant, and demanded of him a fulfilment of the contract. The defendant produced no account as a set-off—but said his papers were scattered and gone, and he owed the plaintiff nothing. The plaintiff commenced this suit in January term, 1836, and on the argument of the case insisted that the two instruments must be construed together as making one contract—that the liability of the defendant was contingent, and

Howe's ex'r v. Woodruff.

that no right of action accrued until the demand of a final settlement. Verdict for the plaintiff for \$811 38, the amount mentioned in the contract, with interest from 1816, subject to the opinion of the court on a case, with leave to either party to turn the same into a special verdict or bill of exceptions.

J. A. Spencer, for the plaintiff.

O. Hastings & M. T. Reynolds, for defendant.

By the Court, BRONSON, J. The plaintiff is right in saying that both of these instruments must be construed together as making one contract or stipulation; but he is wrong in contending that the right of action did not accrue until the demand of a final settlement. The good sense of the transaction seems to be this: Howes, the testator, and the defendant had had dealings with each other, on which a balance was supposed to be due to the testator. These dealings had probably terminated as far back as 1816, for the defendant agreed to pay interest from that time. In 1822, the statute of limitations had nearly or quite run, and the executor wanted such a promise or acknowledgment as would save the claim from the operation of the statute. For some reason, the parties only examine one side of the account; probably the defendant was not prepared at that time to exhibit his demands. The parties sit down and find that the testator's side of the account amounted to \$340 35, and that sum, after deducting his set-off, the defendant agreed to pay. It was added, that whenever it should be convenient to make a final settlement of the account, the defendant might take up the note on giving a judgment. Nothing further is done until after the statute of limitations had more than twice run upon the new promise, and then the plaintiff demands a final settlement, and brings this action. It cannot, I think, be maintained without proving a new promise or acknowledgment within the last six years before suit brought.

Howe's ex'r v. Woodruff

The original cause of action was neither extinguished nor suspended by the arrangement in 1822. The plaintiff might have sued the next day, and used the new promise or acknowledgment, both as an evidence of the extent of his demand, and as an answer to the statute, had it been pleaded. The defendant might have produced his set-off and had it allowed; but he would have had no other answer to the action. It is impossible to maintain that the right to sue upon the original cause of action was suspended for a moment by the partial adjustment in 1822.

The plaintiff seeks to avoid this difficulty by counting on the new promise as a new and independent contract. It is not entirely clear that a good count can be framed on that instrument. It is rather an acknowledgment of liability upon a prior contract, than a distinct independent undertaking. But waiving this consideration, the plaintiff has, in declaring, put a wrong construction on the contract. He treats it, in effect, as an undertaking on the part of the defendant *to make a final settlement when required to do so by the plaintiff*. Now, I think, there was no *promise* to make a *final settlement* at any time. The *promise* was, to pay *the specified sum*, or so much as should remain after allowing the set-off. The defendant reserved the right to bring in his claims, and he also reserved the *privilege* of substituting a judgment for the note (as it was called) whenever, or *if* a final settlement should be made.

But suppose there was a promise to settle, it was not an undertaking to do so *when required by the plaintiff*. The language is, "whenever it is *convenient* to make a final settlement." The legal effect of such a stipulation, is, I think, that the act shall be done *within a reasonable time*. It cannot mean that the thing shall be done on the *demand of the party*, for then he might demand immediately, and before a proper time had elapsed. "Convenient," as here used must mean such a time for doing the act, as under all the circumstances of the case should be reasonable.

If the plaintiff had counted upon a promise to settle *within a reasonable time*, or if such was the legal effect of the undertaking, the statute had twice run after that reasonable

 Bank of Utica v. Bender.

time had elapsed, before this action was brought. Until something appears to the contrary, we cannot say that more than a month or two was necessary for adjusting a small amount like this, and more than 13 years had elapsed before suit brought.

The plaintiff's case rests, I think, on the common counts. He is thrown back upon the original cause of action, which seems to have accrued about 23 years ago. He has an acknowledgment or new promise in 1822, but the statute has run upon that, and the action cannot be maintained.

Judgment for defendant.

 BANK OF UTICA vs. BENDER.

Notice of non-payment sent per mail to the *place* designated by the *drawer* of an accommodation bill of exchange, for whose benefit the bill was discounted, as the *residence of the endorser*, is sufficient to charge the endorser, although he in fact reside in another town, and receives his papers at a post office in still another town.

All that can be required of the holder of paper in such case is, *reasonable diligence*, in making inquiry as to the residence of the endorser; and the holder in this case having received information from an individual in whom the endorser reposed so much confidence as to become his surety for the payment of a debt, it was held, that he had done all that could be demanded of him. What is *reasonable diligence* in cases of this kind, where there is no dispute as to the facts of the case, is a *question of law*.

THIS was an action of *assumpsit*, tried at the Oneida circuit in October, 1838, before the Hon. PHILO GRIDLEY, one of the circuit judges.

The action was against the defendant as *endorser* of a bill of exchange for \$1000, dated at *Chittenango*, February 27th, 1838, drawn by Henry H. Cobb, on Sanford Cobb of Albany, and payable to the order of the defendant, at the Commercial Bank of Albany, four months after date. The defendant was an accommodation endorser, and the draft was discounted by the plaintiffs for the benefit of the drawer. Under the defendant's name as endorser, was

Bank of Utica v. Bender.

written *Chittenango*, and notice of demand and non-payment of the draft was sent by mail, directed to the defendant, at that place. The defendant resided at the time, and had for twenty years before, in the town of *Manlius*, and he received his letters and papers at the *Hartsville* post office, which is in that town. Hartsville is three miles west of Chittenango, and the defendant lives a mile and a half south from Hartsville, and three miles from Chittenango. Cobb, the drawer, had, before his failure, done a good deal of business with the plaintiffs. The usual custom at the bank was, to inquire of the person presenting paper for discount, the residence of the endorser, and to note it down in pencil, under his name, and this custom was well understood by Cobb, the drawer. The word *Chittenango*, under the defendant's name on this draft, was in the hand-writing of Cobb, the drawer. The plaintiffs did not know the defendant, nor where he lived; no inquiry as to his residence was made at the time the draft was protested, because *Chittenango* had been written by the drawer under the defendant's name. The judge held the evidence sufficient to charge the defendant as endorser, and directed the jury to find a verdict for the plaintiffs. Exception, and verdict for plaintiffs.

J. A. Spencer, for defendant.

W. C. Noyes, for plaintiffs.

By the Court, BRONSON, J. When the facts are all ascertained, what is reasonable diligence is a question of law. "This results," said Spencer, J. in *Bryden v. Bryden*, 11 Johns. R. 187, "from the necessity of having some fixed legal standard, by which men may not only know the law, but be protected by it." Bayley on Bills, 142, 144, and notes. The judge was not requested to submit the question of due diligence to the jury; but had it been otherwise, he was right in treating it as a question of law, there being no dispute about the facts.

Was there reasonable diligence in endeavoring to ascertain the place to which the notice should be directed? Not

Bank of Utica v. Bender.

knowing where the defendant lived, the plaintiffs inquired of the drawer, for whose accommodation the bill was discounted, and relying upon the information given by him, they sent the notice to *Chittenango*, when it should have been sent to *Manlius* or *Hartsville*. This is not like the case of the *Catskill Bank v. Stall*, 15 Wendell, 364, affirmed in error, 18 id. 466; for there the person who took the note to the bank, and gave the information on which the notice was misdirected, was the *agent of the endorsers*, and they had no right to complain that credit had been given to what was, in effect their own representation.

But I am unable to distinguish this from the case of the *Bank of Utica v. Davidson*, 5 Wendell, 587. This was an action against the endorser of a note which had been discounted for the accommodation of the maker, and the notice of protest was sent to *Bainbridge*, when it should have been sent to *Masonville*, where the endorser lived. The person who took the note to the bank, and gave the information on which the plaintiffs acted, was the *agent of the maker*, and it was held that there had been due diligence, and judgment was rendered for the plaintiffs. Sutherland, justice, mentions the fact that the note was *dated* at *Bainbridge*, where the notice was sent, and that the endorser had but recently removed from that place; but the case was put mainly on the ground, that the plaintiffs had a right to rely on the information given by the agent of the maker when the note was discounted. In the case at bar, notice was directed to the place where the bill purports to have been *drawn*; and the only difference between this and the case of the *Bank of Utica v. Davidson*, consists in the single fact, that the endorser of this bill had never lived at *Chittenango*. That does not, I think, furnish a sufficient ground for a solid distinction between the two cases.

How does the question stand upon principle? It is not absolutely necessary that notice should be brought home to the endorser, nor even that it should be directed to the place of his residence. It is enough that the holder of a bill make diligent inquiry for the endorser, and acts upon the best information he is able to procure. If after doing

Bank of Utica v. Bender.

so, the notice fail to reach the endorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence—such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence when better could have been obtained.

Now, what was done in this case? The plaintiffs inquired of Cobb, the drawer of the bill, who would of course be likely to know where his accommodation endorser lived. They saw that the defendant, by lending his name, had evinced his confidence in the integrity of the drawer; and so far as appears, nothing had then occurred which should have led the plaintiffs, or any prudent man, to distrust the accuracy of Cobb's statements concerning any matter of fact within his knowledge. He professed to be able to give the desired information, and his answer was unequivocal. If Cobb was worthy of being believed, there was no reason for doubt that the endorser resided at Chittenango. The plaintiffs confided in the information, and acted upon it.

But it is said that Cobb had an interest in giving false information for the purpose of protecting his accommodation endorser, and consequently that the plaintiffs should not have trusted to his statement. He certainly had no legal interest in the question. If the bill was not accepted and paid by the drawee, Cobb, as the drawer, was bound to pay and take it up from the holder; and if the endorser was charged, Cobb was bound to see him indemnified. In a legal point of view, it was wholly a matter of indifference to him whether notice of the dishonor of the bill should be brought home to the endorser or not. Before any thing can be made out of the objection, we must say that the plaintiffs were bound to suspect that Cobb, when he presented the bill, intended to commit a fraud; that he was obtaining a discount upon a draft which he knew would not be paid, either by the drawee or by himself; that the money was to be lost to some one, and that he preferred the loss should fall on the holder rather than the endorser; and consequently, that he would give false information concerning the proper place for directing notice. It is quite evi-

Bank of Utica v. Bender.

dent that the plaintiffs entertained no such suspicion ; for if they had, they would neither have confided in the statements of Cobb, nor would they have loaned him the money. I think they were not bound to believe that a fraud was intended. There was nothing in the circumstances of the case calculated to induce such a belief in the mind of any man of ordinary prudence and foresight. This was an every day business transaction, where men must of necessity repose a reasonable degree of confidence in each other, and no one can be chargeable with a want of diligence for trusting to information which would usually be deemed satisfactory among business men. If there was any ground whatever for suspecting fraud on the part of Cobb, it was, to say the least, very slight, and was fully counterbalanced by the fact, that the defendant had testified his confidence in Cobb by lending his name as endorser. The plaintiffs have, I think, lost nothing by trusting to information derived from the drawer of the bill, instead of seeking it from some other individual.

The case then comes to this. The plaintiffs applied for information to a man worthy of belief, and who was likely to know where the endorser lived. They received such an answer as left no reasonable ground for doubt that Chittenango was the place to which the notice should be sent. I think they were not bound to push the inquiry further. Men of business usually act upon such information. They buy and sell, and do other things affecting their interest, upon the credit which they give to the declarations of a single individual concerning a particular fact of this kind within his knowledge. This is matter of common experience. Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered. This is the only practical rule. If the holder of a bill is required to go further, it is impossible to say where he can safely stop. Would it be enough to inquire of two, three or four individuals, or must he seek intelligence from every man in the place likely to know any thing about the matter ? It would be difficult, if not impossible, to answer this question.

New trial denied.

Moulton v. Kavana.

MOULTON vs. KAVANA.

Notice given by a plaintiff in a justice's court, at the close of the trial, and before the rendition of judgment, in the hearing of the defendant's counsel that he will apply for an *immediate execution* should judgment pass in his favor, is sufficient to authorize the issuing of the execution on the oath of danger.

So a *written notice* given to the defendant on the day next after the rendition of the judgment, and three days before the issuing of the execution, of an intention to apply for the execution, is sufficient, although it states neither *time or place* when the application will be made.

ERROR from the Oneida common pleas. Kavana brought an action of *false imprisonment* against Moulton, for causing him to be arrested on an execution issued from a justice's court, on a judgment in favor of Moulton against Kavana, which execution he alleged had been *illegally issued*, previous to the time limited by the statute for the issuing of justice's executions; and that if it had been issued on oath of danger, that he (Kavana) had not had due notice of Moulton's intention to apply for such execution so as to enable him to give security. The suit before the justice, of Moulton against Kavana, was tried on the *fifth* day of June, 1837; at the close of the trial the justice informed the parties that he would take four days to make up his judgment. Whereupon the counsel for Moulton said that if judgment should be rendered in favor of Moulton he should require *immediate execution*; the counsel for Kavana then being present. On the *ninth* day of June the justice rendered judgment in favor of Moulton, who on the next day, caused a written notice to be served on Kavana that he would apply for an execution on the judgment, (omitting to state *when* and *where* he would make such application.) On the *thirteenth* of June, Moulton made the usual oath of danger, and the execution issued upon which the defendant was arrested. The common pleas decided that both the *verbal* and *written* notice were insufficient within the meaning of the act, and the jury, under the charge of the court, found a verdict for

Moulton v. Kavanaugh.

the plaintiff for \$75 damages, on which judgment was rendered. The defendant sued out a writ of error.

C. Tracy, for the plaintiff in error.

A. Bennett, for the defendant in error.

By the Court, COWEN, J. The question is whether Moulton took the regular steps to obtain execution, within 2 R. S. 178, 9, § 134, 135, 2d ed. The first section, viz. 134, prescribes the time within which execution may issue of course against a freeholder or inhabitant of the county having a family. The time is ninety or thirty days after judgment, according as the sum recovered shall exceed twenty-five dollars or not. Then the 135th section provides, that on the oath of danger, execution may go immediately, unless stayed by bond. It adds, that "application for such execution may be made either *before or at the time* of rendering the judgment; or, if *reasonable notice* be given to the adverse party, of the intention to apply for such execution, such application may be made at any time after the judgment shall have been rendered."

We think that the execution was regular, whether it be referred to the notice given at the close of the testimony, or after the judgment was rendered. The object in either case is, to afford the defendant a chance for staying execution, by giving the bond mentioned in § 136. The only difference between this and the former statute is, that by the former, execution on oath might go without notice, which required the defendant sometimes to do an act of supererogation, to give security when the plaintiff, perhaps, had no intention to apply for execution. It also gave the plaintiff an opportunity to mislead the defendant, by assurances that execution would not be required, or by holding forth appearances which might create that impression. The statute, we think, did not mean to allow the defendant to come in and contest the issuing of an execution by cross-examining the plaintiff, or any body else who should make the oath of danger. He is to prove facts sufficient to convince the justice. From this

Moulton v. Kavana.

alone is the justice to judge. Such is the course of the application for speedy process in other cases, such as warrants, attachments, &c. Had the statute intended the great strictness of demanding time to be specified in the notice of applying, either at the trial or afterwards, it is highly probable the legislature would have said so in terms, instead of mentioning application or notice generally. Either of the notices in this case enabled the defendant to prevent execution by at once giving the requisite security. If he omitted it, the consequence was not a very severe one; he was merely compelled to pay damages which he ought to have paid some time before. Ample time was in fact allowed upon both notices. The strictness required by the court below would multiply facilities for evading the execution, by escape or otherwise.

The objection that the first notice was given to the defendant's counsel and not to him personally, is without foundation. His counsel must have been put forward by the defendant as his agent for the purposes of the cause; and it was his business on receiving the notice, to apprise his client, as it is presumable he did. The notice need not, in all cases, be personal. Suppose the defendant does not appear at all, but keeps beyond the reach of notice: if it be shown that he is out of the way, and that the notice has been given to persons from whom he would probably receive it, as his wife, or some one of his family of suitable age and discretion, at his house, that would be enough. Service on his agent engaged by him to transact the immediate business of the cause, is still better.

It was not much insisted, in argument, that the notice to the agent was defective; but reliance was mainly put upon the second notice, both as a waiver of the first and as defective in itself. Admitting the latter to be defective, the argument destroys itself. If the last was a mere nullity, it is difficult to see how it is to operate upon the first at all. It was probably intended merely as a more abundant caution, from fear that the first might not be deemed operative. But either was sufficient.

The judgment of the court below must be reversed, and a *venire de novo* must issue.

 Fish v. Hubbard's administrators.

MILLER vs. BUSH.

This court will not, upon a *common law certiorari*, review the decision of a justice of the peace in a cause before him, in refusing the defendant leave to withdraw a demurrer and to plead *de novo*, after judgment against him.

In this case a *common law certiorari* was issued to a justice of the peace who had rendered a judgment in favor of *Bush* against *Miller*. The *certiorari* was of course returnable in this court. One of the errors relied on by the plaintiff for the reversal of the judgment was, that the justice refused leave to the defendant below to withdraw his demurrer to the plaintiff's declaration and to plead *de novo*, after judgment against him on the demurrer. There were other questions in the case which it is not deemed important to notice. In respect to the above question, THIS COURT held, the opinion being delivered by Mr. Justice BRONSON, that they could not upon a *common law certiorari* review the decision of the justice in refusing the defendant leave to withdraw the demurrer and to plead. 17 Wendell, 464.

 FISH vs. HUBBARD'S ADMINISTRATORS.

Where by a written agreement one party agreed to furnish another with water out of the mill-dam sufficient to carry the fulling mill and carding machine, and at all times to have such a share of the water as would be sufficient to carry one wheel, when either of the wheels of the grist mill and saw mill were running, without any description of the location of the dam or mills, or allusion to the ownership of the same: IT WAS HELD, in an action brought by the party who by the terms of the agreement was to be furnished with water, on a motion for a new trial, he having been nonsuited, that *parol evidence* was admissible to show the location and ownership of the dam and respective mills, in reference to which the agreement was made to show that the party granting the privilege was, at the date of the agreement, the owner of a mill dam, a grist mill and saw mill, and that the other party at the same time was the owner of a fulling mill and carding machine in the vicinity of the other mills and dam, and that the respective parties owned no other mills or dam.

Fish v. Hubbard's administrators.

The above decision was made on the assumption that the declaration in the cause contained *averments* to which the proof offered would apply.

The rule of Lord Bacon, that "*ambiguitas patens* is never holpen by *averment*," considered and commented upon ; and the doctrine advanced that the rule is necessarily subject to qualification, and has been so adjudged in a variety of cases referred to.

THIS was an action of *covenant*, tried at the Oswego circuit in November, 1838, before the Hon. PHILo GRIDLEY, one of the circuit judges.

The action was commenced on a contract under seal executed by the intestate, *Norman Hubbard*, in these words : " This agreement, made this 12th February, 1822, between Norman Hubbard of the first part and Adam G. Fish of the second part, both of Volney, county of Oswego and state of New York, witnesseth, that the said party of the first part, for and in consideration of the sum of fifty dollars to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do agree to furnish the said party of the second part with *water out of the mill dam* sufficient to carry *the fulling mill and carding machine* at all times, except either in drought in summer or the usual times of freezing in winter, and at all times to have such a share as is sufficient to carry *one wheel* when either of the wheels of *the grist mill and saw mill* are running ; and further, if the said party of the second part should wish to use more water than for the true purposes above mentioned, he is to have the privilege at all times when the water is such that it will not interfere with *the other mills*. (Signed) Norman Hubbard, L. s." The defendants pleaded *non est factum* and other pleas, and also gave notice of special matter to be proved on the trial. The plaintiff read the above instrument in evidence, and *offered to prove* that at the date of the agreement Norman Hubbard owned *a mill dam, a saw mill and a grist mill* on the Oswego river in the town of Volney, and that the plaintiff, Aaron G. Fish, owned *a fulling mill and clothing works and carding machine* a little below the mills and dam of Norman Hubbard, and that Hubbard and Fish owned *no other mills or dam* ; and also offered to prove a breach of the covenant and the

Fish v. Hubbard's administrators.

damages sustained thereby by the plaintiff. The counsel for the defendants objected to the admission of such evidence on the ground that it was inadmissible to give *parol evidence to explain the agreement* and show *what dam* and *what mills* were meant by it—that a *patent ambiguity* cannot be explained by parol testimony. The circuit judge sustained the objection and *non-suited* the plaintiff, who now asks for a new trial.

J. A. Spencer, for the plaintiff.

B. Davis Noxon, for the defendants.

By the Court, COWEN, J. The learned judge at the circuit, thought the description of the property in the covenant so entirely uncertain, that the instrument was inoperative and void. And it is clearly so if we are bound to stop with reading it, and cannot go beyond the face of the contract in search of its meaning. Were this a will, or deed conveying land, and the reference to the mill dam, carding machine and fulling mill, were used as description of parcels, then it is clear that in its own nature it would refer to some subject matter, in respect to which we must look out of the instrument, and locate and apply the description if in our power, upon what is called extrinsic evidence. And if it were in proof, that the deviser or grantor owned one mill dam, one carding machine, and one fulling mill, and no other property of that description, at the date of his will or deed, ought we to hesitate in saying that he intended to pass such property? or, should we say that, possibly he might have intended some property of his neighbor or neighbors, answering a similar description? A location or application of the description of parcels, must always be made by evidence *aliunde*; and it seems to me, that the mind could be left in no more doubt upon such evidence, as to what property was intended, than if it had been described with the fullest accuracy. The instrument would be of a nature to pass the *deviser's* or *grantor's* property, and that alone. This he would know; and he would also know

Fish v. Hubbard's administrators

that that was the only property to which the description could be applied. According to the primary meaning of the language, nothing would be described. But it well might have a secondary meaning growing out of extrinsic circumstances. It is said, here is a *patent* defect of language, coming within *Bacon's* rule as to ambiguities, which cannot be helped by averment. But words cannot be denominated uncertain or ambiguous, because the court which is called upon to explain them, may be ignorant of a particular fact, art, or science, which was known to the person who used them. *Wigram on Extr. Ev.* 130. *Nollekens*, the sculptor, made a codicil thus: "Memorandum—all the marble in the yard, the tools in the shop, bankers, *Mod*, tools for carving, the rasp in the draw, &c., shall be the property of *Ales Goblet*." No one could read this as necessarily meaning the testator's property; yet no one thought of questioning that the codicil was meant of what he himself owned. But above all, the judge could not say that *Mod* meant any thing. And he ordered artists to be examined. They explained the meaning. It was found to signify a certain sort of property which the testator owned, amounting to £700. *Goblet v. Beechy*, *Wigr. on Extr. Ev.* 139, App. 3 Sim. 24, S. C. This cause was successively before Sir John Leach and Sir Launcelot Shadwell, and I am not aware that, in any stage of the cause, the propriety of receiving explanatory circumstances was at all doubted. The decision of Sir L. Shadwell, was afterwards reversed by Lord Brougham; but Mr. Wigram says the decision did not affect this question. *Wigr. on Extr. Ev.* 134, 135, 156.

Again: it is the duty of the court to make a will or deed effective if possible. *Ut res magis valeat quam pereat*. A man devises all his real estate; and, on inquiry, it is found that he owned none at the time; but he had a power of disposition over the land of another. It has been held that the words "my real estate," shall apply to and pass such as he had the mere power to devise. *Lewis v. Lewellyn*, 1 Turn. Ch. R. 104, and see *Standen v. Standen*, 2 Ves. jun. 589, and *Napier v. Napier*, 1 Sim. 28; *Wigr. on Extr. Ev.*

Fish v. Hubbard's administrators.

30. The broad principle on which these cases go is, that the will must, if possible, be made operative. A testator devises all his lands in a particular county; he owns some land there, and over others he holds a mere power. The latter shall not pass, because there is enough beside on which the will, in its direct and primary sense, may take effect. But if there be none there, but the lands subject to a power, although in no legal sense can such lands be called his, yet the will shall operate. *Napier v. Napier*, 1 Sim. 28. In applying the principle, we see that the courts take up the words of the will, which they discover cannot be satisfied according to their legal import. The words there stand entirely indefinite and uncertain, until the court find, on casting about, that there is certain land which the testator might have devised or conveyed in another form; and that these are the only lands upon which the instrument can operate; and they give the words a direction and application to that land. Take the language of Best, J. in *Lewis v. Lewellyn*. He says: "*Ut res magis, &c.* That is the general principle of *Standen v. Standen*; and we must look only to the general principle, for it is impossible to find two cases alike. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power." And may we not say so in respect to the covenant before us? There was nothing in the state of the case, as proposed to be made out by evidence, on which the covenant could operate, except the dam and pond of the defendant's intestate, and in favor of the carding machine and fulling mill of the plaintiff; for the defendant's intestate owned no other dam and pond; the plaintiff no other machine and mill.

I have so far adverted to the doctrine upon wills and other assurances of title, and, in principle; I can perceive no difference between the method of applying a description of parcels in such instruments, and that which we are to adopt in ascertaining the subject matter of an executory agreement. Indeed, a question arose in the late case of *Shortrede v. Cheek*, 1 Adolph. & Ellis, 57, the decision of which would seem to go the whole length of sustaining the ground taken

Fish v. Hubbard's administrators.

by the plaintiff in respect to the covenant in question. Cheek, the defendant, on the 11th of May, 1832, wrote to Shortrede, the plaintiff, thus: "Sir, you will be so good as to withdraw *the promissory note*, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £45." It was agreed that this was a contract which, by the statute of frauds, it being to answer the debt of another, must therefore be sufficiently clear and certain on its face, to show a consideration and a subject matter. In order to make out both, the plaintiff at the trial introduced a variety of extrinsic evidence. He proved that at the time, he held a note of £35 against the defendant's son, dated January 28th, 1832; and a letter subsequent to the guaranty, (of January 10th, 1833,) in which the defendant acknowledged himself under obligation to discharge the £45 due from the son; but the memorandum referred to in the guaranty was not produced. The jury, in answer to a question put by the judge at nisi prius, said they found *that the guaranty of May 11th referred to the son's note*, and found for the plaintiff £47. White moved for a new trial, because the description in the note was uncertain; or if not, the extrinsic evidence adduced to give it application was insufficient. On the first point, the court sustained the finding. It is more material to the question before us to see how the second point was disposed of. White said, "The letter of May 11th, which is relied on as a guaranty, does not state any consideration with certainty, and is therefore not binding. The consideration should be expressed *with sufficient certainty to exclude the necessity of parol evidence*. The defendant in this letter says, 'you will be so good as to withdraw *the promissory note*.' [Littledale, J.: Do you say the *amount* of the note must be stated? If so, should the *date* also be specified? Parke, J.: It appears by the letter to be a promissory note *held* by the plaintiff. If that is not sufficient, how far would you carry the objection?] White: It does not even appear that *the note was a note given by the son*. [Parke, J.: *A guaranty is to receive its application from the state of facts as shown in evi-*

Fish v. Hubbard's administrators.

dence. Here there was no proof of any promissory note but one.] *White*: There might be no doubt in point of fact; but *the question is, whether enough was expressed in writing to satisfy the statute of frauds.* The objection arises before the evidence in explanation can be received. On production of the document, it does not appear in writing what the consideration for the promise is. [*Parke, J.*: Suppose, instead of 'the promissory note,' it had been 'the hogshead of tobacco in your possession,' must it have been described by marks and numbers? *Lord Denman, Ch. J.*: Or 'the corn you sold my son,' must it have been shown what corn it was? *Parke, J.*: Even if the note had been fully described, you might say that it was possible there might have been another note; and the contrary should have been shown."] *Lord Denman* finally remarked, "There would be no end to such a course of objection. It might be said that the plaintiff perhaps had another son, and that the letter did not show what son was meant." *Littledale, J.* said, "It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to show which was meant. So if there had been two notes in question for the same sum, but of different dates. But *when upon the evidence*, only one note appears to be in question, no such explanation is necessary, and the statement in writing is quite sufficient." *Parke, J.* said, "The defendant by his letter requests the plaintiff to withdraw some promissory note which is in his possession, and promises, on his doing so, to pay the amount, &c. There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration. Then, the consideration being executory, the plaintiff is to show that he has fulfilled it, and, for that purpose, must of necessity prove by parol evidence, that the note withdrawn by him was the thing meant by the agreement."

I have thus preferred letting the judges speak for themselves in the case cited; and it appears to me their remarks are of easy application to the covenant before us. I will

Fish v. Hubbard's administrators.

only ask, how was Mr. Justice Parke and Lord Denman authorized to say the guaranty spoke of a note in the plaintiff's possession? It said nothing of that in terms. Their version went upon the absurdity of requesting the plaintiff to withdraw a note which he had no control over; just as in the covenant before us, it would be absurd to say that the parties might mean a dam and machine and mill that neither of them owned. The case of *Crawford v. Jerrett's heirs*, 2 Leigh's R. 630, 637, was a case similar in principle to *Shortrede v. Cheek*, and goes quite as far. Mr. Wigram, Extr. Ev. 59, 138, says of a devise, &c., "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, *by means of extrinsic evidence*, place itself in the situation of the testator, the meaning of whose language it is called upon to declare." See also per Parke, J. in *Doe, ex dem. Templeman, v. Martin*, 1 Nev. & Mann. 524, and per the Lord Ch. in *Guy v. Sharp*, 1 Myl. & K. 602. It appears to me the remark is applicable to every description in a written instrument. It is strikingly illustrated by the case of *Hodges v. Horsfall*, 1 Russ. & Mylne, 116, which presents, I think, a case of still greater uncertainty than any we have noticed. The defendant agreed to demise certain premises to the plaintiff, "with additions intended to be made thereto by S. H. [the plaintiff,] *as per plan agreed upon*." The only question between the parties was, what plan? This involved the inquiry, between *what parties*? Was it a plan on paper or by parol? It was not disputed that the plan must be such as had been agreed upon *by the parties*. Then two different plans on paper appear to have been talked of between them, and the proof was not decisive which was agreed upon. Therefore the master of the rolls, and afterwards the lord chancellor, held that a case was not made out. But neither seem to have doubted, that the apparently great uncertainty on the face of the instrument might have been obviated on a full case being established by the evidence *aliunde*; yet the question of uncertainty was ably argued by counsel for the defendants. The point they made was, that the words were not specific or descriptive of any plan;

Fish v. Hubbard's administrators.

but they merely mentioned some plan on *paper* or by *parol*; and the uncertainty was such as made it dangerous to go into parol evidence. Lord Chancellor Eldon replied that he considered the reference sufficient on all the authorities, and proceeded to examine the sufficiency of the testimony. Mr. Wigram adds a *quere*, whether this case did not go too far. Wigr. on Extr. Ev. 101, note (b). But he admits that *Shortrede v. Cheek*, is not to be questioned, and thinks it sustains his criticism on *Hodges v. Horsfall*, id. *addendum*, before p. 1. The certificate of a notary that notice of protest was put in "*the post office*," was held explainable by showing orally at what post office the notice was in fact mailed. *Gale v. Kemper's heirs*, 10 Lou. Rep. (Curry,) 205. Again; notes were payable to "the commissioners of the town of Demopolis," without naming them; and the plaintiffs were allowed to recover, on showing by proof *aliunde*, that *they* were such commissioners at the date of the note, and that it was delivered to them. *Mundine v. Cranshaw et al.*, 3 Stew. R. (Alabama,) 87.

But we are admonished again and again, by the counsel for the defendants, that *ambiguitas patens* is not explainable; and that every ambiguity is *patent* which appears upon the face of the instrument. Phil. Ev. 467, Am. ed. of 1823. Bacon's Elem. Rule 23. So says Lord Bacon; and he adds, that "*ambiguitas patens* is never holpen by averment and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth, shall not pass but by deed." It is not necessary to deny this maxim as limited and explained by the examples which the author himself gives. They are only two: one of a gift to *J. D. et J. S. et hæredibus*, omitting to say the heirs of which. The other a gift in tail, remainder in tail; "provided that if he, they or any of them, do any," &c. restraining them of certain acts, in order to perpetuate the estate. In the first case you cannot aver whether the gift intended the heirs of J. D. or J. S. nor in

Fish v. Hubbard's administrators.

the second, that the proviso was intended only of him in remainder. In short the rule is one of construction, applicable to the words of a will, deed or any express contract; and it is confined to words which have no reference, by implication or otherwise, to matters out of the writing in question. This is obvious from what he adds immediately after his two examples: "of these, infinite cases might be put, for it holdeth generally, that all ambiguity of words *by matter within the deed*, and *not out of the deed*, shall be holpen by *construction*, or in some cases by *election*; but never by *averment*; but rather shall make the deed void for uncertainty." It is impossible, if we take *ambiguity* in its broad sense of *doubtfulness*, *uncertainty* and *double meaning*, (see Johnson's Dict.) to maintain Lord Bacon's maxim one moment, when we compare it with the adjudged cases. Mr. Wigram has started, and, I think, solved the inquiry into the extent of the maxim. He says, it may be asked whether the rule is not violated when explanatory evidence, or evidence of collateral facts and circumstances is admitted in aid of a description which *upon the face of the will* is inaccurate or imperfect. With confidence, it is answered no. The inaccuracy of the testator's language, in such cases, is undoubtedly *patent*; but as the meaning of inaccurate [uncertain] language *may* be unambiguous, it is impossible to predicate of a will, in such cases, or in any case, that it is ambiguous, until the effect of bringing the language into contact with the facts to which it refers, shall have been tried, [and here he instances the application of the word *mod* in *Goblet v. Beechy*.] He adds "To what class of cases, then, does Lord Bacon refer, in speaking of *patent ambiguities*? Let his own commentary upon the rule answer for him. The examples by which he illustrates that part of the rule, which relates to patent ambiguities are not cases of misdescription of the *object* of the testator's bounty or of the *subject of disposition*; but cases in which (the persons and things being *sufficiently* described) the testator's general intention with respect to them is ambiguously expressed. A devise to *one of the sons* of A. who has several sons, is a case within the principle. No person in particular is intended by the will." Wig. on Exr. Ev. 134, 5.

Fish v. Hubbard's administrators.

It is by such a course of reasoning alone that the rule can be saved. No one can deny that it is very loosely expressed, though a veneration for the great character of Lord Bacon as a logician, has led English judges and writers on evidence into a constant repetition of it, without often advertng to its singular generality. It never was acted upon in its widest extent, and as far as the decisions have gone, it is said by a learned judge, that after several efforts he had found himself unsuccessful in his attempts to reconcile them. *Story, J. in Peich v. Dickson*, 1 Mason, 11. In the case at bar, if the defendants' intestate had covenanted to supply water from "my mill dam," it might still be objected that an ambiguity remains, for he might have had more than one dam, or for want of stating the town, because he might have had a dam in another town, and so of the county and state; which defects would all be obviated by showing, as was proposed here, that he really owned but one dam in the world, and that just above the carding machine and fulling mill of the plaintiff, on the same stream. In *Peich v. Dickson*, 1 Mason, 12, *Story, J.* said, "If, by a written contract, a party were to assign his *freight* in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to *goods* on board of the ship, or an *interest* in the earnings of the ship; or, in other words, to show in which sense the parties intended to use the term." In the case thus put, we will suppose the facts in evidence, that the assignor had at the time no *interest* whatever in the ship itself, but only goods on board; is it possible that Lord Bacon's rule must be received to shut our eyes on the palpable conclusion, that he meant the goods and not the ship-rent? And see *Cole v. Wendell*, 8 Johns. R. 116; also *Mechanics' Bank v. The Bank of Columbia*, 5 Wheat. 326, 336. I remember some years ago, I think at the Clinton or Essex circuit, trying an action on a promissory note, payable in *deal*. The parties were neighbors in the village of Keeseville, and the defendant a blacksmith, who insisted by way of defence that he had always been ready to pay the note by services in the line of his

Fish v. Hubbard's administrators.

trade. On the facts coming out, I asked the jury what the word *deal* meant; and they found in answer that it meant services in the line of the defendant's trade. I think that case was afterwards before this court, on some motion which involved the question whether such an ambiguity could be so explained. Be that as it may, I am confident my decision was not disturbed; nor can I bring myself to believe that such a contract or such a defence must fail, because it happens to come literally within Lord Bacon's rule. The remarks of Sir Thomas Plumer, M. R. in *Colpoys v. Colpoys*, Jacob, 451, gives the sense of the English cases, and he says the books are full of instances sanctioned by the highest authority both in law and equity: "When the person or the thing is designated on the face of the instrument, by terms imperfectly understood and equivocal, admitting either of *no meaning* at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the evidence of those circumstances, that the ambiguity was *patent*, manifested on the face of the instrument." He had before asserted that rather than allow the instrument to be avoided, words *wholly indefinite* in themselves, the instrument at the same time furnishing no materials by which they could be defined, might be explained by a resort to extrinsic circumstances, and should be so explained. The search is after the real intention; and so powerful is the dominion of those circumstances in showing it, that they were lately received by the supreme court of the United States to change the meaning of a contract wherein the words were neither imperfect when taken according to their ordinary import, nor in any sense affixed to them by usage. On the 19th of November, 1831, the defendant, by a note in writing, agreed with the plaintiffs to hire of the latter their steam boat *Franklin*, until "the *Sydney*" should be placed on a certain route. Oral evidence was given, first by the plaintiffs, that "the *Sydney*" meant the defendant's steam boat, then being built at Baltimore, and that she was not placed on the route till the 7th February, 1832. This

Fish v. Hubbard's administrators.

was not even objected to, though the words were obviously quite as uncertain as those in the case at bar. The defendant then offered to show that the Franklin was wanted by him to ply from Washington to Potomac creek, on a certain mail route for which he had been contractor during several years, but on which no boat had been or could be employed after the ice had stopped the navigation; and that the Franklin was thus stopped about the 5th of December; all these facts being known to the plaintiffs, who also knew that the defendant was building the Sydney for the same route. The plaintiffs claimed pay according to the words of the contract, "until the Sydney was placed on the route." But the court held that, under the circumstances, neither party could be considered as meaning that the Franklin should draw wages after the carriage of the mail by water had become impracticable, though the Sydney should happen to be unfinished. *Bradley v. The Washington &c. Steam Boat Co.*, 13 Peters, 89. Three judges, Thompson, Catron and Story, justices, dissented on the ground that the contract was unambiguous, and new and independent stipulations were sought to be ingrafted upon it. The majority of the court may have carried the principle too far; but the case is useful, whether we look at the proof on the side of the plaintiff or defendant, as showing the great power of extrinsic evidence in giving meaning to the words of the parties. Without going so far as to allow that the time agreed upon could be shortened, we may safely adopt what was conceded both by the counsel and the court, that "the Sydney" might by the circumstances, be made to read "the *steam boat* Sydney, *now owned* and being built by the defendant *at Baltimore*." The writing itself neither called "the Sydney" a *boat*, nor declared *to whom* it belonged, nor *where* it lay.

Several cases were cited by the counsel for the defendant. I have examined them, and find nothing decisive against our ability to sustain the covenant before us. My main attention has been directed to the cases cited by him from our own reports. *Abeel v. Radcliff*, 13 Johns. R. 297, 299, was clearly a case of *patent ambiguity*, within Lord

 Fish v. Hubbard's administrators.

Bacon's rule. The clause rejected for uncertainty, had no reference to a subsisting object. The hypothetical *dictum* in *Jackson, ex dem. Lowell, v. Parkhurst*, 4 Wendell, 369, 374, I am certainly not prepared to concede in its full extent. A grant of "all *the land* lying north of a certain highway, in a certain town," I do not believe to be irremediably void, provided it be shown that the grantor owned land there. A case not cited, at least not included in my notes of the argument, is the strongest. *Schuyler v. Van Der Veer*, 2 Caines, 235. It was an action on an award, "that the said John Schuyler and John Van Der Veer, should finish *the house* between them, and be so far complete as to board it over the roof, and the floor complete, and a chimney; and, if the said John Van Der Veer should keep *the stove*, then he should pay John Schuyler fifty shillings, for it. That the costs of *the arbitration* should be jointly borne." A majority of the judges clearly thought the award uncertain, as referring to *the house, the stove, and the costs*, without saying *what house, what stove, or what costs*; though Thompson, J. thought all the defects might have been obviated by proper averments. It is enough, however, to say that the question stood and was decided upon a demurrer to the replication which set forth the award without attempting to make it certain by averments. It was impossible for the learned judges to pronounce absolutely, in advance, that the certainty of what was meant could not be made very clear by the surrounding circumstances. I will barely refer to Watson on Arb. and Awards, 122, *et seq.*, indeed the whole of section three, (now, I take it, in the hands of the American profession generally, through that excellent series of publications, the Law Library, No. 31, 32, and the cases there cited,) in order to say, that *Schuyler v. Van Der Veer*, might now, perhaps, be deemed a case proper for reconsideration, even in respect to the principal points decided by it.

On the whole, it is impossible to doubt of the meaning of the covenant in question, on the extrinsic or collateral facts offered in evidence at the trial. It is possible that the declaration may have been defective, if it did no more than

Fish v. Hubbard's administrators.

set forth the covenant in question *verbatim*. It may have been too meagre for want of averring or reciting the facts offered in proof; but this is not a motion in arrest, and the declaration, therefore, is not before us. If the plaintiff shall deem it defective, he may move to amend.

The question before us is one upon evidence to explain and apply the covenant. We think that the evidence offered for that purpose was improperly rejected; and that there must be a new trial, the costs to abide the event.

Ordered accordingly.

[Remainder of October term in next volume.]

CASES OF PRACTICE

AND

DECISIONS IN NON-ENUMERATED MOTIONS.

PEET vs. MCGRAW.

March, 1840.

A writ of error will not lie until a final determination of all the issues joined in the court below, unless from the record itself it is apparent that the judgment rendered in the court below disposes of the whole matter.

In this case a motion was made to quash a writ of error, sued out by the plaintiff below, who brought an action of *replevin* for a pair of horses. The declaration contained two counts. The defendant pleaded the general issue and a special plea to each of the counts. Issues of fact were joined upon all the pleas except the special plea to the second count, to which there was a *demurrer*, and upon which the court below gave judgment for the *defendant*. Whereupon the plaintiff, without disposing of the issues of fact, sued out a writ of error; and in answer to the motion to quash the writ, read an affidavit that the cause of action was the same in each count, and if the plea to the second count on which the court below had given judgment for the defendant could be sustained, it was useless to proceed with the action.

By the Court, NELSON, Ch. J. I was at first struck with the force of the reason urged in favor of a decision on the writ of error as to the plea sustained on demurrer by the court below, without requiring the party to go on and try the issues of fact, as it went to the whole cause of action,

Peet v. McCraw.

and refused to quash the writ, thinking it useless the parties should be at the expense of trying those issues in the face of the opinion of the court. But I am now satisfied it should have been quashed. I was led into the mistake by allowing the legal import of the pleadings on the record to be controlled by the opposing affidavit; whereas nothing short of a change of such import or effect entered upon the record itself, should have been regarded. If both counts included the same cause of action, and a valid bar to one would be equally so to the other, and the plaintiff wished to avoid the expense of trying the issues formed upon both, he should have entered a *nolle prosequi* as to one. That would afford the best and safest evidence of the fact, and nothing short can be allowed for the purpose of this writ.

It is only upon the idea that the *whole matter is disposed of and ended* in the court below, that the writ of error can be sustained; and that should be determined from an inspection of the record itself, not by affidavit. *Metcalf's case*, 11 Coke, 38, is decisive upon this point. It is there said in the second resolution, that the words in the writ *si iudicium inde redditum sit*, &c. are intended not only a judgment in the *chief matters in controversy*, but also in the whole, so that the suit may be at an end. Several examples are given. Such as an action of trespass for taking cattle: as to parcel, the defendant pleaded not guilty; and as to the other, he pleaded another plea, to which there was a demurrer, afterwards the issue was found for the plaintiff, upon which he had judgment; but error would not lie till the whole matter was determined. The reason given is, that if the record should be removed, before the whole matter be determined in the court below, there would be a failure of justice, for the king's bench cannot proceed upon the matters not determined, and upon which no judgment is given; and the whole record ought to be in the common pleas or king's bench; "it is entire, and cannot be here and there likewise." The court below is not authorized to send the record till the whole matter is determined. The writ is conditional, *si iudicium inde redditum sit, tunc recordum, et processum, &c. mittatis, &c.* The word *inde*, it is said,

goes to the entire matter, and until that is determined, the record and proceedings are not to be sent by the terms of the writ.

Lord Coke mentions one or two exceptions to the general rule in *Metcalf's case*, p. 41, but they are out of the ordinary proceedings in a suit, and stand upon grounds peculiar to the particular case and mode of proceeding. Where the determination below shows that the party is entitled to judgment upon the whole record, there, though there may be other issues, error may be brought; the case then falls directly within the reason of the general rule. The whole matter is disposed of and at an end. 1 Saund. 80, n. 1. The case of *Jack v. Martin*, 12 Wendell, 311, is an example, and the remark will explain some other cases cited by the counsel for the plaintiff here. It will not, I admit, explain the case of *Post v. Jackson*, 17 Johns. R. 239 and 479, and perhaps others, but these must have been carried up without the objection taken, and stand upon the acquiescence of the parties; or possibly the whole case may have been disposed of below, though not stated in the report of the case.

I am clear, therefore, that the writ must be quashed; but as the attorney for the plaintiff in error proposes now to enter a *nolle prosequi* upon the *other count*, he may do so in the court below, as of *the term judgment was rendered on the demurrer, on payment of the costs of the issues upon it to the defendant's attorney*, in 20 days after service of a copy of this rule; in that case, the writ to stand; otherwise, to be quashed.

As the motion was before unadvisedly denied, the attorney for the plaintiff must refund the costs paid on that motion.

No costs of this motion on either side.

 Trumbull v. Healy.

TRUMBULL vs. HEALY.

March, 1840.

Special bail are entitled to have an *exoneretur* entered on the bail piece, where the *principal* has obtained his discharge as an *insolvent debtor*, since the rendition of the judgment against him; and that whether the discharge be granted under the act to *exonerate the person of the debtor from imprisonment* or under the *two-third act*.

An *exoneretur* will be ordered, notwithstanding the allegation of *fraud*; the question of *fraud*, can be raised only by a new action.

THIS was a motion by *special bail* for an *exoneretur*, on the ground that the *principal*, since the judgment against him, had obtained a *discharge* under the act to *exonerate the persons of debtors from imprisonment*. The motion was resisted on the ground that the principal not being a *resident* of this state, came here *fraudulently* for the purpose of obtaining his discharge.

By the Court, NELSON, Ch. J. As a general rule, the *certificate* of a bankrupt, or *discharge* of an insolvent debtor, is equivalent to a surrender in discharge of *special bail*; and an *exoneretur* will be entered on motion. The relief is summary, as the facts cannot be pleaded by way of defence to an action on the recognizance. 2 Bos. & Pull. 45. 1 Archb. Pr. 311. The bail are discharged in these cases without the trouble and expense of a surrender, because the principal is not liable to imprisonment on the debt.

In 1 Caines, 249, to an application for an *exoneretur*, the court refused to hear the objection that the discharge was not duly *stamped*, saying, the act made it *conclusive*, except in cases of fraud. In 9 Johns. R. 259, they refused to hear affidavits charging fraud in obtaining the discharge, on an application of the *principal* who had been surrendered by his bail, saying it had been so decided in several cases at the previous term, and that the plaintiff must resort to his action. The same was held in 9 Wendell, 431; and it follows of course, if the allegation of fraud, would not be permitted against the discharge of the principal it would not on motion to discharge the bail.

Trumbull v. Healy.

In 1 Cowen, 50, an application was made by the *principal* to be discharged from arrest on *mesne process* on filing common bail, and resisted on the ground of fraud. After a very full discussion the court discharged him, saying none of the proceedings before the discharge could be questioned in this summary way. It had been obtained under the two-third act. But in p. 228, another case in the same volume, they refused to discharge from arrest on *mesne process*, on a *prima facie* case of fraud being shown against the discharge. This was under the act to abolish imprisonment. The distinction was made, doubtless, upon the provision of the act of 1819, which authorized the debtor to be held to bail on *mesne process*, on the allegation of fraud. 7 Cowen, 518. The same provision is now extended to suits against persons holding a discharge under either act, and therefore the ground for the distinction no longer exists. 1 R. S. 795, § 21, 22.

The amount of the decisions on this subject seems to be, that the principal will be discharged, and an *exoneretur* ordered on the bail piece, on behalf of the bail, as the case may be, where judgment has been obtained before the discharge, on a summary application, and the allegation of *fraud* will not be heard on affidavits in opposition. The plaintiff *must resort to his action* against the principal, in which he may be arrested and held to bail on the debt, notwithstanding the discharge here under the two-third act as well as the act to abolish imprisonment. 1 R. S. 795, § 21, 22. Then the defendant being compelled to plead the discharge, the issue on the allegation of fraud will be tried as it should be before the court and jury. Cases may occur where the court would open the judgment and allow the discharge to be pleaded in the original action, instead of compelling the plaintiff to institute a new suit; but these must depend upon their own circumstances, and will be exceptions to the general rule.

The bail, as I have before stated, cannot plead the discharge in an action against them; the only way in which it can be made available is either by motion or a feigned issue. The latter is sometimes ordered in England, though

Ex parte Robinson.

the practice appears to be unsettled. Petersd. on Bail, 393, 109. Bos. & Pull. 390. 1 Barn. & Ald. 332. Bagley's Pr. 171. 1 Archb, Pr. 310, 311, and cases there cited. I have found no case where a feigned issue has been ordered by this court on such a motion, and think the practice ought not to be introduced. There are now very few cases, comparatively, in which the defendant can be held to bail, and the expense of a feigned issue would be generally disproportioned to any advantage that could accrue to the plaintiff; especially since he may arrest the defendant anew and hold him to bail, and thus litigate, incidentally, the validity of the discharge in the course of obtaining the second judgment.

Upon this view of the practice, the bail here are entitled to be discharged. Let an *exoneretur* be entered.

Ex parte L. ROBINSON proceeded against as an absconding debtor.

March, 1840.

In a proceeding against a person as an *absconding debtor*, the affidavit required by statute to be made by disinterested witnesses, though unqualified in its terms that *the debtor had left the state with intent to defraud his creditors*, is not enough to justify the issuing of a warrant; the witnesses must state *the facts and circumstances* to establish the grounds on which the application is made, so that the officer to whom the application is made may exercise a discretion in the matter.

THE proceedings in this case were brought up by *certiorari*. It was objected that the affidavit required by statute of disinterested witnesses, to authorize the issuing of the warrant, was not sufficient. The substance of the affidavit is stated in the opinion delivered by the Chief Justice.

By the Court, NELSON, Ch. J. The statute prescribes, that whenever the debtor shall *secretly depart from the state with intent to defraud his creditors, &c.*, application for an attachment may be made, &c. 1 R. S. 765, § 1. The application shall be made in writing, verified by the affidavit of the creditor, &c. and among other things, shall state "the

Ex parte Robinson.

grounds" upon which it is founded. § 4. And the facts and circumstances to *establish the grounds*, &c. shall be verified by the affidavit of disinterested witnesses. The witnesses in this case state that they had inquired for R. at his late residence, and were informed that he had left the state for Michigan, and was not in the county. They further say, *that he has left the state with intent to defraud his creditors*. The counsel for the applicant supposes that the fact itself of absconding with the fraudulent intent, is here affirmed by the two witnesses, and that it is better evidence than the *facts and circumstances*. The statute, however, requires them to be stated, and was intended to break up the practice of swearing within the words of the general ground upon which the process issued.

Affirming that a party has left the state *with intent to defraud his creditors*, may be predicated more upon matters of opinion, or belief, than upon fact. The affirmant may honestly believe, and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the officer (being thus enabled to exercise his judgment in the matter) might well differ from him. Certainly, as far as the witnesses here undertook to explain, they failed altogether in laying any foundation for their conclusion, unless we are to assume that a visit to Michigan is at least *prima facie*, if not conclusive evidence, of an intent to abscond in fraud of creditors. The case of *Smith v. Luce*, 14 Wendell, 237, is an authority on this point. There, in an analogous case, the affidavit was in the general words of the act, but was holden defective in not stating the *facts and circumstances* upon which the general affirmation was predicated.

Proceedings reversed.

Hills v. Tallman's administrator.

HILLS vs. TALLMAN'S ADMINISTRATOR.

March, 1840.

An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a *debt owing by the intestate*, will not be allowed by the court, in the exercise of its equitable powers to set off such judgment.

IN October term, 1839, a judgment was recovered *in the name of the plaintiff* against *W. M. Tallman*, as administrator of D. Tallman, deceased, to the amount of \$272 14 on a former judgment against his intestate. The judgment had been assigned to one Paul P. Yale. In December, 1839, the defendant, Tallman, purchased a judgment against Yale, in favor of Bennett & Stryker to the amount of \$225 69, and took an assignment to himself as administrator. The purchase was made in consideration of \$136 50, for which he gave his individual note; and a motion was now made to set off the latter judgment against the former.

By the Court, NELSON, Ch. J. The question is, whether the judgment purchased by the administrator can be set off against one, recovered against him, as such, on a demand due from the intestate. It appears to me the authorities as well as the policy of the law is against the application.

The English statute of 2 Geo. II., ch. 22, § 13, is substantially like our own, 2 R. S. 279, § 37, 38, 39, under which it has been determined in a suit by an executor, whether describing himself as such or not, to recover a debt, *where the cause of action accrued after the death of the testator*, the defendant cannot set off one due him from the estate. Willes, 264, note, and 104, n. a. Babington on Set-off, 64, 65. 8 Wendell, 530. 4 Johns. Ch. R. 13. The reason is, if allowed, it would alter the course of distribution. The demand when collected is assets, out of which the defendant is entitled to be paid only in due course of administration; whereas, if the set-off be allowed, there might be an undue preference over other creditors: his debt would thus be paid in any event.

Hills v. Talman's administrators.

If, therefore, Tallman should bring a suit upon the judgment he holds, against Yale, the latter would be precluded from setting off his, according to the above cases; and if so, as the rule is mutual, the former would equally fail if the action was against him. 4 Johns. Ch. R. 13. Neither should he be permitted, as the effect upon the assets would be the same as if Yale had set off his debt.

Our statute appears to have been drawn with reference to this exposition of 2 Geo. II., § 37. In suits brought by executors and administrators, demands *existing against their testators or intestates, and belonging to the defendant at the time of their death*, may be set off, &c. § 39. In actions against executors and administrators, &c. they may set off demands *belonging to their testators or intestates, &c.* These provisions accord with the doctrine of the case of *Kilvington, ex'r, v. Stevenson*, Willes, 264, note, before referred to, and which has always been regarded as sound law. It was there conceded, if the debt had existed in the lifetime of the testator against the defendant, he might have set off his demand against the estate. That would have been a case within the statute of Geo. II. There would have been "mutual debts" existing between the testator and defendant; or, in the language of our old statute, 1 R. L. 515, § 1, they would have been persons "indebted to each other," or having "demands arising on contract, or credits against each other;" the *balance* only, in that case, if any, would be the debt, and enter into the assets. 20 Johns. R. 137, and see 2 Paige, 402.

In any view that can be taken of this case, the set off must be denied. If the judgment against Yale belongs to Tallman individually, then the objection is insuperable—the debts exist in different rights, 5 Mad. R. 459; and if he holds it as administrator, it belongs to the assets of the estate, and must be applied in the usual course of distribution.

Such are the authorities, and they are founded in justice and sound policy.

Motion denied, with costs.

Fenton v. Folger.

FENTON vs. FOLGER.

COFFIN vs. FOLGER & TOWNSEND.

March, 1840.

Where there are two executions in the hands of the sheriff, one against a firm consisting of two members, and the other against one of the members of the firm for his *individual debt*, upon both of which executions the *partnership property* is sold, and the sum raised by the sale is not sufficient to satisfy both executions, the creditor holding the execution against the firm is entitled to a preference in the appropriation of the proceeds of sale; but where the property is sold on the execution against the *individual partner*, though after the delivery of the execution against both partners, the plaintiff in the execution on which the property was sold is entitled to the proceeds, if at the time of the sale, sufficient time had not elapsed for advertisement and sale under the other execution.

APPROPRIATION of moneys raised by execution. *Folger* and *Townsend* were *partners* as rope manufacturers. *Fenton* having obtained a judgment against *Folger* for \$1234 31, for a debt owing by *Folger* *individually*, had an execution delivered to the sheriff on the 13th May, 1839, which was levied upon a quantity of rope, cordage, hemp, &c. the *partnership property* of *Folger* and *Townsend*, which was *advertised* to be sold on the 21st October. On that day the sale was postponed until the 25th, and then to the 26th October, when it took place, and about \$1000 made. On 21st October, 1839, *Coffin*, the plaintiff in the second above entitled cause, delivered an execution to the sheriff on a judgment obtained by him against *both members of the firm*, viz. *Folger* and *Townsend*, for \$1076 23, and now claims that the proceeds of the sale be appropriated towards payment of the execution in his favor.

By the Court, NELSON, Ch. J. This is a motion on the part of *Coffin*, the plaintiff in the second above entitled cause, to have the moneys raised by the sale on the 26th October applied to the payment of his execution. The ground taken is, that though his execution is *junior* to *Fenton's*, he is entitled to have it first satisfied out of the partnership funds, on the authority of *Crane and others v.*

Fenton v. Folger.

French and Wilkens, 1 Wendell, 311. Such preference was there given, for the reason that the execution against the *individual partner* was a lien only upon *his moiety* of the surplus after a settlement of the partnership accounts; and the rule would doubtless govern this case, provided *Coffin* was in a condition to claim the appropriation. But he is not. There has been no sale on his execution. It came into the hands of the sheriff on the 21st, and the sale took place on the 26th October, five days after; it was received. There was not, as appears from the papers before me, nor could there have been, either advertisement or sale of the property under it. *Fenton's* execution has, therefore *by virtue of the sale*, acquired priority; and, as the facts stand, the money should be paid over to him.

If A. and B. have two several judgments against C., and they take out writs of *fi. fa.*, which are delivered at different days, and the sheriff execute that which was last delivered, the sale is valid; and the only remedy of the plaintiff, whose writ was first delivered, is by action against the sheriff. *Smallcomb v. Cross and Buckingham*, 1 Ld. Raym. 251. 4 East, 538. Bingham on Executions, 247. Watson on Sheriffs, 177. 12 Johns. R. 162. 1 Cowen, 594. The party cannot seize the property by the execution first delivered, after such sale. Id. The case of *Ribot v. Peckham*, 1 T. R. 731, note *a*, is decisive on this point. That was an action against the sheriff for a *false return* to a *fi. fa.* The plaintiff delivered his execution to the sheriff, under which his officer levied the debt *by sale*; then the sheriff discovered an older execution in the office, and returned the plaintiff's *nulla bona*. The defendant obtained a verdict; but on motion for a new trial, on the ground that, though the other *fi. fa.* being delivered first, was material between the plaintiff in that suit and the sheriff, and would be sufficient to charge him with that debt, it was not material between the present plaintiff and the sheriff, for *he having once sold under the plaintiff's execution, was answerable to him for the debt*; and on showing cause, the counsel for the defendant gave up the case, and a verdict was en-

 Howell v. Eldridge.

tered for the plaintiff. The doctrine is fully confirmed by the judges in the principal case. 1 T. R. 729.

Coffin can stand in no better condition than if his execution had been first delivered to the sheriff. It would be most unjust now, to allow the fund to be diverted from Fenton's execution. The property was bid off to something like the amount of it. The plaintiff, as is to be presumed, knew the sale to be under his execution, and felt no interest beyond raising the debt. If he had known that Coffin's execution took priority, he would probably have raised the bids on the property, as according to the opposing affidavit, there was enough to have satisfied both executions.

Besides, if there be any question, and from the facts as disclosed it is not improbable, about the right to sell the whole interest of the firm, Fenton may have made himself accountably to the party damnified.

The motion, therefore, must be denied, with costs.

 HOWELL & HOWELL vs. ELDRIDGE.

March, 1840.

Where one of two plaintiffs dies *after judgment*, execution may issue without *scire facias* as well in *ejectment* as in a *personal action*; but it must be in the joint names of both defendants.

This court will not intermeddle with questions of costs in chancery required to be paid as *conditions* to applications here; but leaves that court to vindicate its own authority.

MOTION to set aside a writ of *habere facias possessionem* as issued *irregularly*, and for a new trial under the statute in an action of ejectment. The suit was originally commenced in the Suffolk common pleas, where the plaintiffs obtained a verdict in October, 1830. In *January* 1831, a new trial was granted by the common pleas, and in the month of *May* following, the cause was removed into this court by *certiorari*. Proceedings in this court were then stayed by an injunction granted by the vice chancellor of the first circuit until October, 1834, when the cause was tried (the injunction

Howell v. Eldridge.

having been modified for that purpose) and a verdict was again obtained by the plaintiffs. In February, 1836, *Stephen Howell*, one of the plaintiffs, died, having by his last will and testament devised his interest in the premises in question to *Nathaniel P. Howell*, his co-plaintiff. The suit in chancery progressed until May, 1839, when the bill was dismissed with costs, but without prejudice to an application to this court for a new trial, on condition that the defendant pay the costs of the suit in chancery, which were taxed at \$249 06. In October, 1839, this court granted leave to have a judgment entered upon the verdict in October, 1834, as of October term, 1834, without prejudice, however to the right of the defendant to apply for a new trial under the statute. Judgment was accordingly entered, and on 23d October, 1839, a writ of *habere facias possessionem* was issued in the names of both plaintiffs, and possession delivered to the surviving plaintiff. The plaintiff resisted the motion on the grounds: 1. that the writ of possession was regularly issued, and 2. that the new trial granted by the C. P. was granted under the statute, and that consequently the defendant was not entitled to a *second new trial as a matter of course*; and besides that the costs in chancery had not been paid. In answer to which, it appeared that the *affidavit* upon which the motion for a new trial was founded set up *newly discovered evidence* as the ground of the application; but the *notice* of the application was for a new trial under the statute *as well* as on the ground of newly discovered evidence. The rule entered in the common pleas is general, not specifying on what ground the new trial was granted.

By the Court, NELSON, Ch. J. The writ of *habere facias*, I am of opinion, was regular. The revised statutes do not reach the case; it rests, therefore, upon the practice at common law. The general rule in all personal actions is, that where there are two or more plaintiffs or defendants, and one dies *after judgment*, execution may be sued out without any *scire facias*, 1 Archb. 374, and cases there cited, but it must be in the joint names of all the plaintiffs or defendants, and in

Howell v. Eldridge.

other respects conform to the judgment. Id. 2 Saund. 72, (K.) note 3.

Eyre, *arguendo*, in *Penoyer v. Brace*, 1 Ld. Raym. 244, gives the true reason, and which was afterwds adopted by Lord Holt. He said that where the execution of a judgment is not chargeable or beneficial to a person who was not a party to the judgment, there a *scire facias* was unnecessary, as in case of supervisorship. In that case one of five defendants had died, and Lord Holt said there was no need of a *sci. fa.*, because there was no alteration of the record, nor any new person made liable to the execution. See also 2 Ld. Raym. 808. A suggestion of the death should, however, be made on the record.

The reason of the rule does not apply in its full force to the action of ejectment under our statute; but I perceive no serious objection to it in practice. The interest of a deceased co-plaintiff would descend to the heir or pass to the devisee, and therefore not survive, but the surviving plaintiff receives the possession, and holds as well for the heir or devisee as for himself, the same as in the case of a personal action where he receives the demand, a moiety of which may belong to the personal representative of the deceased. If both plaintiffs were living, it would be entirely competent for one to receive possession under the *habere facias*. Under the old form of ejectment the question would not arise, as the nominal plaintiff never died. 4 Burr. 1970. In an anonymous case, 3 Salk. 319, it was held that *after judgment* in ejectment, where there are more plaintiffs (meaning lessors, probably,) and defendants than one, after the death of one, execution may be taken out by the survivors, without *sci. fa.*, upon making suggestion on the roll. We are, therefore, but applying to this case the rule which existed under the old form of action, where one or more of the lessors died after judgment; they were the real plaintiffs in the suit.

But without going the length which we have supposed may be maintained consistently enough, I perceive no ground for objecting to the practice in this particular case. Here it appears that the surviving plaintiff took by *devise* the right of the deceased in the premises, and is therefore the

Howell v. Eldridge.

only person interested in the execution of the writ. It would be an idle ceremony to go through the form of making himself a party to proceedings as the devisee of his co-plaintiff.

I am inclined to think a new trial should be awarded *under the statute*. 2 R. S. 235, § 37. As the affidavit on which the verdict was set aside in the common pleas, grounded the motion, exclusively, upon newly discovered evidence, and nothing in the rule indicating the contrary, it is, perhaps, but fair to presume the court acted upon it, whether rightfully or not is now immaterial. We cannot inquire into that question here. If the court placed their decision upon matters not specially relied on in the papers before them, the attorney for the plaintiffs should have had the grounds of it inserted in the rule. It should have indicated that the new trial was granted under the statute.

As to the costs in the chancery proceedings, we take no cognizance of them. The statute prescribes the terms of granting a new trial in this action, and it is our guide; nor shall we stop to inquire as to the conditions said to be imposed by the vice chancellor, as pre-requisites to the granting of this motion here, or whether they have been complied with or not. These are questions for the parties to settle before that court. Though more than three years have elapsed since the time judgment was entered, it was so entered by an order, *October, 1839, nunc pro tunc* as of October term, 1834, without prejudice to this application; it comes, therefore, within the time prescribed by the act.

Ordered, that judgment be vacated and a new trial granted, on payment of all costs and damages recovered in the judgment in this court.



AN
INDEX

TO THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A
ABSCONDING, CONCEALED AND
NON-RESIDENT DEBTORS.

1. An executor or administrator who enters upon leasehold property held by the testator or intestate in his life time, or who receives the rents and profits thereof, is chargeable in the debt and detinet directly on the covenant of the lessee as an assignee, and in proceeding against him he need not be named as executor or administrator. *In the matter of John Galloway,* 32
2. If he have no assets, or the land is in truth not worth the sum due, he may show those facts in defence; *prima facie*, however, the land is deemed worth more than the sum demanded. *id*
3. Being personally liable, he may be proceeded against by attachment under the act relative to absconding, concealed and non-resident debtors. *id*
4. Under the act relative to absconding, concealed and non-resident debtors, proceedings may be had by the trustees of one non-resident debtor for the collection of a debt due from another non-resident debtor. *In the matter of Brown,* 316
5. So a non-resident creditor may institute proceedings under this act against a non-

resident debtor, where the debt is due on a contract made within this state. *id*

6. It is enough that the affidavits of the two witnesses, required by the statute to be presented on the application for an attachment, state that the debtor is a non-resident, or that being an inhabitant he has secretly departed from the state, or keeps himself concealed with intent to avoid the service of civil process; it is not necessary that these affidavits should contain any thing as to the nature of the debt, or the residence of the creditor. *id*
 7. In a proceeding against a person as an absconding debtor, the affidavit required by statute to be made by disinterested witnesses, though unqualified in its terms that the debtor had left the state with intent to defraud his creditors, is not enough to justify the issuing of a warrant; the witnesses must state the facts and circumstances to establish the grounds on which the application is made, so that the officer to whom the application is made may exercise a discretion in the matter. *Ex parte Robinson,* 672
- ACCORD AND SATISFACTION.
1. The acceptance of the note of a third person from one of the members of a firm, endorsed by him, together with the payment of the balance of the account against

the firm in *cash*, is an accord and satisfaction of the demand against the firm; there being no agreement that such note was received merely as *collateral security*. *Frisbie v. Larned*, 450

2. So a *judgment* confessed by one of the partners for the debt of the firm is a satisfaction. *id*

ACTIONS IN GENERAL.

See CONTRACTS, 1. PLEAS AND PLEADINGS, 2, 3, 4.

ALIENS.

1. An *alien widow* is not entitled to dower, although at the time of her marriage her husband was also an *alien* and held land under the act of 1825 enabling aliens to purchase and hold real estate. Her husband had the capacity to purchase and hold real estate; but she not having such capacity, cannot claim dower in the lands of her husband. *Connolly v. Smith*, 59
2. The *nephew* of a person dying intestate and seized of an estate of inheritance, although a *naturalized citizen*, is not capable of inheriting the estate, if his father be an *alien* and living at the time of the decease of the person last seized, notwithstanding the provision in the statutes of descents, "that no person capable of inheriting, &c. shall be precluded from such inheritance by reason of the *alienism* of any ancestor of such person." *The People v. Irwin*, 128
3. Our statute is substantially like the act of 11 and 12 Wm. III., ch. 6, and must receive the same construction, viz. that it does not enable a person to deduce title through an *alien ancestor still living*. *id*
4. In an action of ejectment for the recovery of lands, *alienage* of the plaintiff cannot be alleged as a bar to a recovery, although he was born in Scotland in 1769, and remained an inhabitant there until 1830, where it is shown that the *father* of such plaintiff was a resident of this country previous to and at the time of the declaration of independence, and remained here until his death, in 1823. *Young v. Peck*, 389

AMENDMENTS.

Where there are issues of law and of fact, and the plaintiff proceeds to the trial of the issues of fact before disposing of the issues

of law, and the issues of fact are found against him, and the issues of law are also subsequently decided against him, *leave to amend* will not be granted to him. *Eddy v. Stanton*, 255

See EJECTMENT, 2.

ARREST OF SHIPS AND VESSELS.

See SHIPS AND VESSELS.

ASSUMPSIT.

1. Where goods are sold to be paid for by a note or bill, payable at a future day, which is not delivered according to the terms of sale, the vendor may sue immediately for a *breach of the special agreement* and recover as *damages*, the whole value of the goods, allowing a rebate of interest during the stipulated credit; he cannot, however, maintain *assumpsit* on the *common counts* until the credit has expired. *Hanns v. Mills*, 90
2. Where goods are to be paid for in a note or bill, the *vendor* cannot recover on the common count for *goods sold and delivered* until the *credit has expired*; but he may proceed immediately for a breach of the special agreement. *Yale v. Coddington*, 175

See ESTOPPEL, 2.

ATTACHMENT.

A *bond* executed by an officer to be relieved from arrest on an *attachment* issued against him for not returning an execution, where the penalty exceeds *one hundred dollars*, is *void*, if the attachment was issued without an order fixing the amount in which the party proceeded against, should be held to bail. *Bank of Buffalo v. Boughton*, 57

ATTORNEY.

An *attorney* who prosecutes a suit to judgment, has not power by virtue of his general authority to discharge a defendant from arrest on a *ca. sa.* without the actual payment of the debt. *Simonton v. Barrell*, 362

B

BAILMENT.

1. In an action against stage-coach proprietors as *common carriers*, for the loss of

goods entrusted to them, where the route of the road occupied by them is stated in the declaration as *more extensive* than it is in fact, a *renewal* will not be granted for the variance, if in truth the goods were actually received by them and lost upon that portion of the road which they occupied: and on the contrary, *leave* will be given to the plaintiff to *amend without costs*. *Clark v. Faxton*, 153

2. Notice that all boxes and parcels sent by a stage coach will be *at the risk of the owners*, does not relieve a common carrier from responsibility, though brought home to the knowledge of the owners of the goods. *id*

3. In an action against the owners of a steamboat as *common carriers*, where the boat stranded in entering a harbor in the night time, in consequence of the master mistaking a light upon a stranded vessel for a light usually exhibited by the keeper of the beacon light, by means whereof the plaintiffs sustained damage; it was held, that nothing will excuse the *common carrier*, except the two ordinary excepted cases: *inevitable accident without the intervention of men, and the acts of public enemies*; that neither of the exceptions existed in this case; and that proof of the utmost vigilance and care on the part of the master was irrelevant and inadmissible in defence of the action. *McArthur v. Sears*, 190

4. The rule of law is the same in respect to a carrier by water as to a carrier by land; nor is there any distinction whether the navigation be upon the *ordinary rivers*, or the *great rivers and lakes or inland seas* of this country, except so far as the exceptions in favor of the carrier are extended to the *perils or dangers of the rivers or lakes*, by the special terms of the contract contained in the charter party or bill of lading. *id*

5. The clause, "except the perils or dangers of the rivers or lakes," and various cases arising under it, cited, considered and commented upon. *id*

6. An *innkeeper* is responsible for the safe-keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an open unenclosed space near the public highway. *Piper v. Manny*, 282

7. *Common carriers*, who carry passengers and their baggage as well as merchandise are answerable under their common law li-

bility for the baggage of passengers left at their offices in charge of their agents, with the intention of proceeding with the same in the next train of cars, steam boats or other conveyances departing from the place where the baggage is deposited. *Camden and Amboy Rail Road Co. v. Balknap*, 354

8. A notice of "all baggage at the risk of the owners" is no protection to common carriers. *id*

See SALE OF CHATTELS, 1.

BAIL, SPECIAL.

1. A bail bond must be conditioned that the defendant will appear by putting in special bail within twenty days after the return day, &c. in the terms prescribed by the revised statutes, or it will be void; a bond in the form used under the old statute is a nullity. *Barnard v. Viele*, 88

2. *Special bail* are entitled to have an *exoneretur* entered on the bail piece, where the principal has obtained his discharge as an insolvent debtor, since the rendition of the judgment against him; and that whether the discharge be granted under the act to exonerate the person of the debtor from imprisonment, or under the two-third act. *Trumbull v. Healy*, 670

3. An *exoneretur* will be ordered, notwithstanding the allegation of fraud; the question of fraud, can be raised only by a new action. *id*

BILL OF PARTICULARS.

See PLEAS AND PLEADINGS, 11. PRACTICE, 2.

BILL OF SALE.

See MORTGAGE OF PERSONAL PROPERTY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Notice of protest sent by mail directed to the town where the party resides is sufficient, although there be several post offices in the same town, unless it appear that the holder knew that it should be directed in a different manner; or now by statute, unless the party when affixing his signature to a bill or note specifies thereon the post office to which notice must be addressed. *Downer v. Remer*, 10

2. Where the sum specified in a notice of protest varies from the true sum, it is for a jury to say, whether the party has or has not been misled. *id*
3. Where there are three consecutive endorsements to a promissory note, the release by the plaintiff of the first-endorser, is a bar to an action against the second and third endorsers. *Newcomb v. Raynor*, 108
4. An action does not lie on a bank check against the drawer until after notice of presentment and non-payment. *Harker v. Anderson*, 372
5. What degree of diligence is necessary on the part of the holder in making presentment and giving notice of non-payment, *quere*. *id*
6. The law in relation to bank checks examined and various cases and dicta in which such instruments are said to be distinguishable from bills of exchange cited and commented upon by Mr. Justice COWEN. *id*
7. Where a bank receives and discounts negotiable paper, places the proceeds to the credit of the holder, and charges over against him and cancels other notes upon which are responsible parties, but which are over-due and lie under protest, such cancellation is equivalent to paying value at the time, and precludes all defence existing as between the original parties. *Bank of Salina v. Babcock*, 499
8. A bill of exchange imports that a debt is due from the drawee to the drawer, which is assigned to the payee of the bill; and if the drawee accepts it, is an acknowledgment on his part that he has funds of the drawer in his hands to the amount of the bill. When the bill is paid and taken up by the drawee, it ceases to be obligatory upon any of the parties. *Griffith v. Reed*, 502
9. The presumption that the drawer has funds in the hands of the drawee, may be rebutted; the drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor, who on this implied obligation, may have an action against the drawer—but not on the bill itself. *id*
10. Where a bill is drawn by one person upon another, and a third party subscribes his name under that of the drawer, adding the word surety to his signature, the undertaking of such third party is with the payee or subsequent holder, that the bill shall be accepted and paid; but he incurs no obligation whatever, either express or implied, to the drawees. *id*
11. Where a bill of exchange is sent to an agent for collection, and merely for that purpose is endorsed to such agent in full, on the bill being returned to the owner protested, he may strike out the endorsement and bring an action in his own name; it is not necessary in such case there should be a re-endorsement. *The Chautauque County Bank v. Davis*, 584
12. A guaranty of a debt in the form of an endorsement of a promissory note is obligatory upon the guarantor; and in case of non-payment by the debtor, the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof. *Oakley v. Boorman*, 588
13. An action does not lie against a notary for the omission of notice of protest to an endorser, where the holder may resort to other grounds for fixing the endorser independent of the notice, and wilfully or negligently omits to avail himself of such facts. *Franklin v. Smith*, 724
14. It seems, however, that in such case, the holder of the note should not only be well apprised of the existence of the facts to which resort might be had to sustain the action against the endorser, but that he should have some intimation that the validity of the notice would be questioned. *id*
15. Notice of non-payment sent per mail to the place designated by the drawer of an accommodation bill of exchange, for whose benefit the bill was discounted, as the residence of the endorser, is sufficient to charge the endorser, although he in fact reside in another town, and receives his papers at a post office in still another town. *Bank of Ulica v. Bender*, 643
16. All that can be required of the holder of paper in such case is, reasonable diligence in making inquiry as to the residence of the endorser; and the holder in this case having received information from an individual in whom the endorser reposed so much confidence as to become his surety for the payment of a debt, it was held, that he had done all that could be demanded of him. *id*
17. What is reasonable diligence in cases of

this kind, where there is no dispute as to the facts of the case, is a *question of law*. *id.*

See EVIDENCE, 6. USURY, 1.

BOND.

1. A *bond* given by a party on suing out an *attachment* from a justice's court, that he will pay all damages and costs if he fail to recover, extends to the final determination of the cause; a recovery before the justice will not save a suit upon the bond if such recovery be subsequently reversed on error brought. *Ball v. Gardner*, 270
2. A *covenant* entered into by a third person, on receiving property levied upon by a sheriff, to deliver it to the sheriff on request or pay the debt, is a valid obligation within the statute declaring void all bonds, &c. taken by a sheriff or other officer by color of his office, in any case or manner other than provided by law. *Acker v. Burrall*, 605
3. The statute forbids only what is *illegal*, it vitiates securities taken for *ease and favor*; and does not render void securities authorized either by the *common law* or *statute*. Unless there is *duress* or *oppression* or *illegal exaction*, the security is good. *id.*
4. A levy upon partnership property, by virtue of an execution against one partner, cannot be alleged as *illegal* in bar to an action upon such covenant; especially where the other partner consented to such levy. *id.*

C

CASE.

1. An action on the case may be sustained by a father for the seduction of his daughter without proving any actual loss of service; it is enough that the daughter be a minor residing with her father, and that he has the right to claim her services. *Hewitt v. Prime*, 79
2. In such action a plaintiff may show in proof in aggravation of damages, any circumstances the natural consequences of the principal act, although they did not transpire until after suit brought. *id.*
3. In an action on the case for a collision of vessels, the plaintiff is not entitled to recover, if the injury is in any degree attributable to his own want of care; and

where such is the fact, and he obtains a verdict, a new trial will be granted. *Bernes v. Cole*, 188

4. An action on the case for a malicious prosecution lies against a party who *falsely* and *maliciously* prosecutes another, although the court in which such prosecution was had was *utterly destitute of jurisdiction* in the matter; consequently it is not necessary in the action for the malicious prosecution to aver or prove that the court in which were the proceedings complained of had jurisdiction, provided that the *malice* and *falsehood* of the charge be put forward as the *gravamen*, and the arrest or other act of trespass be alleged merely as a consequence. *Morris v. Scott*, 281
5. Where a *child* of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a *public highway* without any one to guard him, and is there run over by a traveller and injured, neither *trespass* or *case* lies against the traveller, if there be no pretence that the injury was *voluntary* or arose from *culpable negligence* on his part. *Hartfield v. Roper*, 615
6. In an action for such injury, if there be *negligence* on the part of the plaintiff, there cannot be a recovery; and although the child by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the *parents* or *guardians* of the child furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult. *id.*
7. The same rule, it *seems*, would apply in an action by a *blind* or *deaf* man, or a person *non compos*, who under similar circumstances, received an injury on a public highway. *id.*
8. For an injury to a child of the most tender age an action may be brought in the name of the child. In *England* it seems it *must* be so brought, and that an action cannot be sustained in the name of the *parent*; whether that be the rule here, *quere*. *id.*

CHAMPERTY.

1. Where lands were sold under an execution and the property conveyed by the sheriff to the purchaser, who sold the same to a third person, who *reconveyed* the premises to the first purchaser, it was held that the last deed was *not void for champerty*, although the grantor in the same, at the time of the

execution, was not in the *actual possession of the lands*, they being at the time the *subject of controversy by suit in court*, the grantor having brought ejectment for the recovery of the lands—this decision being made on the principle that the defendants were *quasi tenants of the grantor*, and could not be deemed to hold *adversely*.
Webb v. Bindon, 98

2. Evidence to show that, at the time of the *reconveyance*, the suit brought by the grantor had been settled and was ended, was held to be admissible notwithstanding the production of a record on the other side that the suit was pending, and further, that such evidence did not contradict the record. *id*
3. It seems, that by the alteration of the statute of *champerty*, the taking of a conveyance from a party in possession of lands, the subject of controversy by suit in court, is no longer forbidden. *id*

COMMON CARRIERS.

See *BAILMENT*.

CONSIDERATION.

1. Where lands were sold and conveyed, by deed, containing a covenant for *quiet enjoyment*, and the purchaser executed his bond for the consideration money, it was held, that it is no defence to an action on the bond, that the grantor was not seized in fee and had no right to convey the premises, if there be no allegation of any fraudulent representation on the part of the plaintiff in respect to the title. The above facts showing neither a *failure* or an *original want* of consideration. *Whitney v. Lewis*, 131
2. A promise or obligation cannot be defeated in whole or in part, on the ground of the *inadequacy* of the compensation received for the obligation incurred—the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show *fraud*, *mistake* or *illegality* in its concoction, or *non-performance* of the stipulations of the agreement on the part of the promisee. *Oakley v. Beorman*, 588
3. In an action upon a *promissory note* given in pursuance of a *covenant*, the maker cannot impeach the consideration, the covenant being a good and sufficient consideration; but if within the equity of the

statute allowing the consideration of a *sealed instrument* to be inquired into, the maker cannot avail himself of the defence, unless he has pleaded it or given notice thereof. *Fay's adm'r's v. Richards*, 626

4. Where a party obtains what he contracted for, he cannot avoid his contract on the ground that what he received is *valueless*, unless he shows *fraud* or a *misapprehension* in respect to the subject matter of the contract. *id*
5. It is not indispensable to the validity of a contract, that the cause moving to the act should be mentioned as the consideration; it is enough if from the whole instrument it be manifest that there is a consideration. *Allen v. Jaquish*, 628

See *CONTRACTS*, 2 to 9.

CONSTRUCTION OF DEEDS, &c.

Where premises, situate in the city of New-York, were demised for a term over six and less than nine months, at the yearly rent of \$300, payable quarterly. It was held, that the time of the first payment of rent was not deferred until three months from the date of the lease, but that the rent was payable on the usual quarter days for the payment of rent in the city, happening after the date of the lease. *Leo Wolf v. Merritt*, 336

CONTRACTS.

1. Where parties enter into a contract under seal in their *individual characters*, not describing themselves as *trustees*, *agents* or a *committee*, they are *personally responsible*, although they in fact contract as a committee in anticipation of the incorporation of a literary institution—*parol proof* is not admissible in such case to show that it was not intended that they should be personally liable. *Lincoln v. Crandell*, 101
2. Where it was alleged in a declaration that an agreement was entered into between a rail road company and an individual, by which the latter stipulated, that if the former would locate their road and terminate it at a certain place, and should require certain lands in the vicinity of such termination for the purposes of the road, that he would pay the damages which should be appraised to the owners of the lands; and the plaintiffs then proceeded to aver that the agreement being so made, afterwards, to wit, on, &c., at, &c. is consider-

ation thereof, and that the plaintiffs had promised to perform on their part, the defendant promised to perform on his part; *It was held*, that the promise of the individual was not binding, inasmuch as by the agreement no obligation was incurred on the part of the company, and that the promise of the company set forth as made subsequent to the agreement, was not a sufficient consideration to sustain the promise of the defendant. *Utica and Schenectady R. R. Co. v. Brinckerhoff*, 139

3. *Contracts in restraint of trade*, which totally prohibit the pursuit of an occupation, or the carrying on of a particular business, at any place in the state, are void, as detrimental to one party without being beneficial to the other, and also as *injurious to the public*, let the consideration moving to the contract be what it may; but contracts for a *limited restraint*, as that a man will not exercise his trade or carry on business in a particular place or within certain limits, are valid and will be enforced by the courts, if it be shown that they were entered into for good reasons. *Chappel v. Brockway*, 157

4. *It seems* that it is not enough that there be a consideration, such as would uphold a contract in which the public have no interest; but that whatever may be the pecuniary consideration, it must appear in addition that there was some good reason for entering into the contract, and that it imposes no restraint upon one party which is not beneficial to the other. *id*

5. How far the restraint may extend, depends upon the nature of the business to which the contract relates; as a general rule, it may be said to extend far enough to afford a fair protection to the purchaser of the business which the seller agreed to relinquish. *id*

6. Where the plaintiff and defendant were competitors in running packet boats on the Erie canal between Rochester and Buffalo, and the defendant, for the consideration of \$12,500, was induced to sell out to the plaintiff his boats and other property connected with the business and to enter into a bond in the penal sum of \$25,000, that he would not at any time thereafter, own, run or be interested in any line of packet boats on the canal, within the limits before occupied by him: it was held, that the bond was valid: there being not only a sufficient pecuniary consideration, but a good reason for the contract. *id*

7. A declaration on a bond, restraining the obligor from pursuing the business of a

manufacturer of pot and pearl ashes, for a specified time and within prescribed limits, is bad, if it show no consideration for the giving of the bond by the obligor other than what is to be implied from the seal attached to the bond, and set forth no reason whatever why the bond was executed. *Ross v. Sadgbeer*, 166

8. Ordinarily, where the parties contract by deed, a consideration will be implied from the seal; but that is not enough in cases of this kind. Here the party seeking to enforce the contract must show some good reason for its existence: as that it was given to protect him in the prosecution of a business, which for a proper consideration he had induced the other party to relinquish. *id*

9. *It seems* that if the circumstances inducing a contract in restraint of trade do not appear upon the face of the instrument, that they may be averred in the declaration, and that thus the validity of the contract may be shown. *id*

10. A contract in restraint of trade is, in legal presumption, void; and such presumption can be rebutted only by showing that it was entered into for good reasons, and the burden of showing the facts rendering the contract valid rests upon the party seeking to enforce it. *id*

CORPORATIONS.

1. Where an incorporated company, the capital stock of which is divided into shares, are authorized by their act of incorporation to make calls upon the stockholders for the payment of the sums by them respectively subscribed, in such proportions and at such times as the directors see fit, under penalty of forfeiture of the shares subscribed and of the previous payments made thereon, the company may, in case of non-payment, proceed by suit to recover the amount of the calls, or may declare a forfeiture of the stock. *Herkimer Manuf. and Hydraulic Co. v. Small*, 273

2. So even after suit brought, they may declare a forfeiture of the stock, and such latter proceeding cannot be pleaded in bar of the further maintenance of the suit, where the value of the stock forfeited is not equal to the money due to the company. The stockholder, however, is entitled in such cases, on the assessment of the damages, to insist that the value of the stock forfeited shall be allowed in mitigation or diminution of the sum which the plaintiffs would otherwise be entitled to recover. *id*

3. Where the stock forfeited is equal in value to the money which may be demanded by the company, the forfeiture may be pleaded in bar; but a plea of forfeiture without such averment of value is bad. *id*

4. The clause in an act of incorporation of a turnpike or rail road company authorizing a forfeiture of stock and previous payments in cases of non-payment of calls confers a cumulative remedy; and does not deprive the company of the right to proceed by action for the recovery of subscriptions. *Troy Turnpike and R. R. Co. v. M Chesney*, 296

5. Nor is the company limited to the remedy by forfeiture, although the promise be expressed in the subscription to be upon pain of forfeiting, &c., and consequently the plaintiffs may declare upon such contract as upon an absolute promise. *id*

6. A notice requiring payments to be made to A. B., residing in the city of Troy, is *prima facie* a sufficient compliance with the requirement of the statute that the place of payment shall be designated in the notice. *id*

7. An agent of an incorporated company may receive authority to act for his principals, otherwise than by a formal resolution; it may be collected from circumstances. *id*

8. Under a clause in an act of incorporation of an insurance and loan company in these words, "that in all cases where the said corporation have become the purchasers of any real estate on which they have made loans, the mortgagors shall have the right of redemption of any such property on payment of the principal, interest and costs, so long as it remains in the hands of the said corporation unsold." IT WAS HELD, that a mortgagor's right of redemption continued, notwithstanding that a contract for the sale of the mortgaged premises had been entered into and duly executed by the company, one third of the purchase money paid, and possession taken by making surveys, &c.; and that such right of redemption could be extinguished only by the execution and delivery of a deed of conveyance to the purchaser, who must be deemed to have contracted with notice of the rights of the mortgagor. *Edwards v. Farmers' Fire Ins. and Loan Co.*, 467

9. A purchase by an agent of the company of lands on which they had made a loan,

is a purchase by the company, within the meaning of this act. *id*

See Po s. 5, 6, 7, 8, 9.

WER

COSTS.

This court will not intermeddle with questions of costs in chancery required to be paid as conditions to applications here; but leaves that court to vindicate its own authority. *Howell v. Eldridge*, 678

COUNTY OFFICERS.

See QUO WARRANTO.

COURTS OF JUSTICES OF THE PEACE.

1. Pleadings in justices' courts are liberally construed; but still the proof must correspond with the allegation; it was accordingly held, where a suit was commenced in a justice's court against *Orlando F. and Mary F.* without any intimation in the declaration that the relation of husband and wife existed between them, or that the suit was brought for the recovery of a demand due from the wife whilst sole, though it was avowed on the hearing before referees that the suit was for such a demand, that evidence of a promise by the husband to pay the demand, was inadmissible under the pleadings in the cause. *The People, ex rel. Fuller, v. Oneida C. P.* 20

2. A justice's execution against a party, an inhabitant having a family, issued before the expiration of the time limited by statute, is good, if applied for at the time of the rendition of the judgment, although judgment was not rendered until four days after the trial, and the execution was obtained without previous notice of an intention to apply for the same. *Cogswell v. Cole*, 34

3. Where a justice of the peace has inadvertently issued process, or proceeded in the prosecution of a suit in which he is related to one of the parties by consanguinity or affinity, it is his duty on his attention being called to the fact to suspend all further proceedings; he cannot on that ground render judgment of nonsuit, if the plaintiff be his relative, and if he does render such judgment, it will be reversed. *Edwards v. Russell*, 63

4. Notwithstanding the 47th section of the act relative to "courts held by justices of

the peace," the justice may in his discretion, upon terms, permit a defendant to *come in and plead* who did not appear on the return of a *summons* which had been *personally* served, but subsequently appeared on a day to which the cause had been adjourned at the request of the plaintiff; but *being a matter of discretion*, a court of error will not review the decision of the justice, refusing leave to the defendant to plead, although upon the same state of facts, they would have relieved a party from his default. *Jenkins v. Brown*, 454

5. In a suit in a *justice's court*, on its appearing that a party who has been *arrested* on a warrant for the recovery of damages for the non-performance of a contract was not under the act to abolish imprisonment subject to arrest, it is the duty of the justice to dismiss the proceedings, although they were originally instituted on proof that the defendant was a *non-resident*. *Shannon v. Comstock*, 457

6. A *plea* in a justice's court is not a *waiver* of objections previously taken and decided against the defendant, *id*

7. Notice given by a plaintiff in a justice's court, at the close of the trial, and before the rendition of judgment, in the hearing of the defendant's counsel, that he will apply for an *immediate execution* should judgment pass in his favor, is sufficient to authorize the issuing of the execution on the oath of danger. *Moulton v. Kavana*, 648

8. So a *written notice* given to the defendant on the day next after the rendition of the judgment, and three days before the issuing of the execution, of an intention to apply for the execution, is sufficient, although it states neither *time* or *place* when the application will be made. *id*

See BOND, 1. ERROR, 22.

COVENANT.

1. An *assignee* of covenants of warranty and for quiet enjoyment, may maintain an action on the covenants where *possession* is taken under the deed and there is a subsequent eviction, although at the time of the execution of the deed the grantor had no title. *Beddoe's ex'r v. Wadsworth*, 120

2. The covenants may be assigned as well by a *release* and *quit-claim* as by *deed of bargain and sale*, or by *lease and release*. *id*

3. The damages recoverable upon a breach of covenant of warranty or for quiet enjoy-

ment, belong to the *personal representative* and not to the *heirs* of the party evicted. *id*

4. Where the eviction takes place during the life of the *assignee*, and the damages and costs are paid *in part* by him, and *in part* by his *executor* after his death, the facts may be alleged according to the truth of the case, in an action by the executor. *id*

5. To support an action for breach of covenants of warranty and for quiet enjoyment, an *eviction by title paramount* must be alleged and proved. *id*

See BOND, 2, 3, 4. CONSIDERATION. VENDOR AND VENDEE.

CRIMINAL LAW.

1. Where in an *indictment* for receiving stolen goods, the charge was that the prisoner had feloniously received of an ill-disposed person, to the jurors known as Doman Boyce, a cow, the property of, &c. which had then lately before been stolen by the said ill-disposed person, with knowledge of the felony, and the verdict of the jury was that the prisoner was *guilty of receiving the cow* charged in the indictment as stolen property, *knowing her to be stolen*, without finding *by whom* the property was stolen, the conviction was held proper, and a judgment rendered upon the verdict was affirmed. *The People v. Carwell*, 86

2. On an indictment here against a prisoner for *having in his possession, with intent to pass, forged bank notes*, purporting to have been issued by a banking corporation of a state other than that of New York, it is not necessary to show that there is in fact such a corporation in existence; at all events, proof of the most general character of its existence is sufficient. *The People v. Davis*, 309

3. Where the *direct charge* rests for its proof upon the testimony of *accomplices*, such proof is sufficient to convict, if it be *corroborated by the evidence of credible witnesses*, although such evidence has only an *indirect* tendency to establish the commission of the *particular offence* charged: as where the testimony of the accomplices fixes upon the prisoner the charge of having in his possession counterfeit bills with the intent to pass, and the proof by the unimpeached witnesses shows that the prisoner was possessed of a *press* and *plates* used in making counterfeit impressions of bank bills. The confirmation of the accomplices must, however, be of some fact or facts which go to fix the guilt of the accused.

4. An indictment for forgery is good if in it be set forth the instrument or writing alleged to have been forged, averring it to have been *falsely made* with the *intent* to injure or defraud some person or body corporate, provided the instrument be such *as on its face* to show that the rights or property of such person or body corporate may thereby be injured or affected; it is not necessary that the facts and circumstances of the case showing the *intent*, should be specially set forth in the indictment; it is enough that they be given in evidence on the trial. *The People v. Stearns*, 409
5. It was accordingly held in this case, in which the defendant was indicted for forging an instrument purporting to be a request from the cashier of a bank in Kentucky to the cashier of a bank in New York to deliver to engravers the plates of the bank for the purpose of having new impressions taken, that it was not necessary to allege *either* that there was such a bank in Kentucky, *or* that the person who purported to be the writer of the request was cashier thereof and had authority to make such request, *or* that there were such plates in existence and in the possession or under the control of the cashier to whom the writing was addressed: all this being matter of evidence and not necessary to be set forth in the indictment. Extrinsic facts are necessary to be stated only when the operation of the instrument upon the rights or property of another is not *manifest* or *probable* from the face of the writing. *id*
6. It was further held, that it was not necessary to aver in the indictment that the Bank of Kentucky was a *corporation* duly created; that it was enough to allege that the instrument set forth was falsely made, with the intent to injure and defraud the bank; and that under such allegation an exemplification of the act of incorporation was admissible in evidence. *id*
7. The case of *The People v. Wright*, 9 Wendell, 103, examined and commented upon. *id*
8. The *uttering and publishing* a promissory note with *forged endorsements* upon it, is an offence within the statute against forgery, although the *passing* of the note is accompanied with communications which would exonerate the endorers if the endorsements were genuine; if by possibility the endorers may be injured, the crime is perpetrated. *The People v. Rathbun*, 509
9. The crime of *uttering and publishing* is not complete until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent or servant; thus where a note with forged endorsements is sent by the felon per mail from one *county* to an individual in *another county*, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent; and the *proper place of trial* is the county to which the note was sent. *id*
10. In respect to *misdeemeanors*, where part of the offence is committed in one county and part in another, the rule of law in respect to the *venue* is otherwise; then the trial may be had in either county. *id*
11. On a charge of *uttering and publishing* a promissory note with the names of several persons upon it as endorers, all which endorsements are alleged to be forged, it is not necessary for the purpose of sustaining the indictment, to prove *all* the endorsements to be *forgeries*; it is enough that one or more are shown to be forgeries. *id*
12. It seems, that the uttering here of a *counterfeit foreign* bank bill, the circulation of which is made illegal by statute, would be deemed an offence within the statute, if laid to have been passed with the intent to defraud the bank; though the indictment would be bad if laid to have been passed with the intent to defraud the receiver of the bill. *id*
13. The forming and expressing an opinion by a juror upon the guilt or innocence of a party on trial for a felony, is a *principal* cause of challenge; the mere *forming* of an opinion is enough. *id*
14. Where, on a trial for felony, the prisoner by his counsel consents to substitute the *court* for *trials*, upon challenges to jurors, such consent cannot afterwards be *revoked* and a demand made that a challenge to jurors shall be passed upon by *trials*, especially after the challenge has been passed upon by the court. *id*
15. A bill of exceptions lies for refusing *trials*, or upon any question arising upon a challenge to jurors, in a case where *trials* may be demanded. *id*
16. It is competent, in support of a prosecution, to prove that the prisoner advised an accomplice to break jail and make his escape. *id*
17. Evidence that the prisoner refused to escape and go beyond the reach of the pro-

- cess of this state, after being apprized of the charge brought against him, although he was advised to do so, and it was entirely practicable to have made his escape, is inadmissible. *id*
18. On the trial of an indictment, as well as of a civil action it is competent to the judge to express his opinion to the jury upon the weight of the evidence, provided that such opinion be not expressed in the form of a direction as matter of law; whilst what is said is merely advisory, the charge will not be reviewed. *id*
19. Whether a jury in a criminal case are concluded by the instructions of the judge upon matter of law, or whether they are the sole judges of the law as well as the facts of the case, *quere*. *id*
20. Observations as to the proper matter of a bill of exceptions in a criminal case. *id*

D

DAMAGES.

1. In *replevin*, where the defendant has obtained judgment *de retorno*, and sued out a writ of inquiry to have his damages assessed for detention, the measure of damage ordinarily is the interest upon the value of the goods when taken, from the time of the taking until the *quarto die post* succeeding the execution of the writ of inquiry. *Brizsee v. Maybee*, 144
2. The cost of manufacturing a raw article for and transporting it to market may properly be inquired into, to ascertain the value of the article at the time and place of its taking; but that once being fixed, the measure of damages is the legal interest upon such value. *id*
3. It seems, however, that where a writ of replevin is sued out fraudulently, or without color of right, that a jury would be warranted in giving exemplary damages, as in a case for a wilful and malicious trespass. *id*
4. In an action for the recovery of the price stipulated for the building of a steamboat, the plaintiff is entitled to recover the full amount, without any deduction by way of recoupment of damages to the defendant in consequence of damage sustained by him for the loss of trips and the profits resulting therefrom occasioned by defects in the boat or its machinery. *Blanchard v. Ely*, 342
5. The defendant in such case is, however, entitled to an allowance for moneys necessarily expended by him in supplying defects in the vessel or its machinery, so as to make it conform to the plan specified in the contract; and where it is manifest that an allowance on that account ought to have been made, and was not made by the jury, a new trial will be granted. *id*
6. The courts of common law seem inclined to adopt the rules of the civil law in respect to damages for the breach of contracts relating to personal property, which is that the party entitled to claim performance may claim damages for the non-performance in respect to the particular thing, the object of the contract; but not such as may have been accidentally occasioned thereby in respect to his own affairs—as for instance, a lessee who is evicted by title paramount may claim the expense of removal and indemnity for advanced rents, but is not entitled to recover for loss of custom established whilst residing in the house. *id*
7. It is no bar to a recovery that one of several defendants has become possessed of the right of action prosecuted against him and his co-defendants, unless his name appears upon the record both as plaintiff and defendant. *id*
8. The doctrine of damages generally considered. *id*
9. Where property is wrongfully taken, the subsequent appropriation of it by a sale under an execution in favor of the wrongdoer, will not save the party from answering in damages to the full value of the property. *Otis v. Jones*, 394
10. Whether, if the property, after the original taking, had been seized and sold under an execution in favor of a third person against the owner, such fact might not have been shown in mitigation of damages, *quere*. *id*
11. In an action to recover damages for the non-performance of a contract, other than for the conveyance of land, the rules of damages in the loss or injury sustained by the party ready and willing to perform, and not the price agreed to be paid on actual performance: the rule of law that a tender is equivalent to performance, applies only to the right of action, and not to the measure of damages. *Shannon v. Comstock*, 457
12. It seems, however, that if the non-performance was not involuntary, but on the

contrary was attributable to *fraud* or to a desire to *benefit* the party failing, that such circumstances may be taken into consideration to enhance the damages. *id*

See MORTGAGE OF PERSONAL PROPERTY, 5.
TRESPASS, 2.

DEBT.

See CONSIDERATION.

DEED.

1. *Imbecility of mind*, not amounting to *lunacy* or *idiocy* in the grantor of land, is not sufficient to avoid his deed, where, in the obtaining it, there is no *fraud*. *Odell v. Buck*, 142
2. The doctrine on this subject laid down in *Jackson v. King*, 4 Cowen, 207, approved and adopted. *id*
3. Where a deed is delivered as an *escrow*, to become absolute on the execution of a bond by the grantee for the maintenance and support of a third person during life, nothing can be claimed under it if the bond has never been executed, although such third person has died, and the grantee during his life provided him the necessary support. *Hinman v. Booth*, 267
4. Where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance are flowed by a *mill dam* belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right, and cannot set up an *implied reservation*. *Burr v. Mills*, 290
5. If the owner had *sold and conveyed* the *mill* to a third person, it would have been otherwise; then the right to flow the land would have passed as an incident to the purchaser of the mill, and could not have been cut off by the grantor. *id*
6. A clause in a deed in these words: "Provided, nevertheless, that nothing above mentioned shall be so construed as to injure the privileges heretofore enjoyed with regard to raising water for the benefit of my saw mill where it now stands, or others if erected at or near the same place," was held in this case to be a *reservation commensurate* with the grantors' estate in the whole premises previous to the conveyance, and was not limited to his *own life*; and

that a *device* subsequently made by such grantor to his grandchildren of the east half of the *mill lot*, together with all the rights appertaining to the same, mill privileges, &c., passed the right to flow reserved in the deed. *id*

7. A contract *not under seal*, rescinding a specialty, where such contract is fully executed and carried into effect, is valid. So a contract under seal cannot be set up in bar of a recovery, on an implied promise to pay for work done, stipulated for in the contract, but performed at a time and in a manner different from its provisions, accepted however by the other part; but a specialty cannot be modified by a *parol* or *written unsealed executory agreement*. *Allen v. Jaquish*, 628

8. It was accordingly held, that a subsequent unsealed agreement, to relinquish upon failure to perform certain stipulations, a lease duly executed under seal for a term of years, was inoperative as a *defeasance*, but valid as a contingent *surrender*, the latter being deemed a conveyance in *presenti*, to take effect in *futuro*. *id*

DEVISE.

- A devise of lands without words of perpetuity, in a will made previous to the revised statutes, will not be construed to give a fee by implication, although there be a *personal charge* imposed upon the devisee, if there be a *fund other than the realty*, to which the devisee may look for indemnity, and in immediate connection with which the charge is imposed. *Burlingham v. Belting*, 463

E

EJECTMENT.

1. A grantor cannot set up the defence of *adverse possession* against his grantee or those deriving title from him. *Swart v. Service*, 36
2. Where a plaintiff in ejectment, in his declaration, claims an undivided moiety of the premises, and on the trial shows title to only one fourth, it is in the discretion of the judge at the circuit whether he will nonsuit the plaintiff for the variance, or permit him to take a verdict according to the proof; and if he permit a verdict to be taken, the court in bank will allow the plaintiff to amend upon terms. *Hinman v. Booth*, 267

3. Where premises are *unoccupied*, parties claiming title thereto, or some interest therein, may be named as defendants in an action of *ejectment*; and they are not permitted to complain that others should have been made defendants instead of themselves, if, when applied to on the subject, they omitted to set the plaintiff right. *It seems*, that sometimes the plaintiff in ejectment had an election as to defendants. *Edwards v. Farmers, &c. Loan Co.* 467
4. In an action of *ejectment* against several defendants, if it appear that the defendants occupy *distinct parcels* in *severalty*, the plaintiff may elect to take a verdict against one of the defendants; whereupon a verdict will be rendered in favor of all the other defendants. *Rogers v. Arthur*, 593
5. *Notice to quit* is not necessary, where the terms upon which a lease is to terminate are fixed by the agreement of the parties. *Allen v. Jaquish*, 628

See VENDOR AND VENDEE.

ERROR.

1. The entry of a *verdict* upon the record different from the actual finding of the jury, though such appears to be the fact by a return to a *certiorari* issued for that purpose, cannot be assigned as error; the remedy of the party aggrieved is by *motion* and not by writ of error. *Rhodes v. Bunts*, 19
2. Where in *replevin* on a plea of *non caput* and *property in a stranger*, the jury find a *general verdict* for the plaintiff, an entry upon the record of a finding for the plaintiff upon *both issues* is warranted by the verdict. *id*
3. It is *not error*, though it be omitted to be stated in the record of a judgment if rendered by a court of *general jurisdiction*, that the court had obtained *jurisdiction of the person* of the defendant, by alleging him to be *in custody, &c.*, or that he had been *served with a declaration*, or had *appeared*, or something equivalent to such allegations. *Hart v. Seizae*, 40
4. The necessity of such averment, as suggested in *Smith v. Fowle*, 12 Wendell, 9, denied; or at all events supplied by the entry of an *imprisonment* and default. *id*
5. The omission in the declaration of such allegations, as *in custody, &c.*, is not even cause of *special demurrer*. *id*
6. Where the *debt* demanded is \$300, and the plaintiff takes judgment for his said debt, together with *damages* and *costs*, although the record shows a right to recover only \$200 debt, a judgment by default will not for that cause be *reversed*, it being mere matter of form, *amendable* in the court below, and which the court in error may *disregard*. *id*
7. Where there is a *variance* between the debt demanded and the several sums alleged in the different counts to be due, error will not lie; nor is such variance even cause of *demurrer*. *id*
8. A judgment will not be reversed for errors in *matters of practice*, though brought up by *certiorari*. *id*
9. The question *when jurisdiction will be presumed*, considered. *id*
10. It is *not error*, though it does not appear in the record of a judgment rendered by a court of common pleas that the defendant at the time of the commencement of the suit was a *resident of the county*. *id*
11. See the *dissenting opinion* of Mr. Justice Bronson, to the first proposition above stated. *id*
12. In *assumpsit* where *non assumpsit* and *payment* are pleaded, and the jury pass upon the first plea finding a verdict for the plaintiff, error will not lie for the omission to pass upon the second. *Hanna v. Mills*, 90
13. A judgment entered on a report of referees, where a plea was interposed which required a *replication*, and it did not appear by the record that a replication had been put in, was held to be *erroneous* and not cured by the statute of amendments. The statute cures defects and omissions in matters of *form*, but not those of *substance*. *Yale v. Coddington*, 175
14. Where, as was done in this case, it is suggested on the argument that there was in fact a replication put in, the court will suspend pronouncing judgment, to give the plaintiff below an opportunity to apply to amend his record, which will be granted on payment of the costs of the writ of error and of the motion, and giving leave to the plaintiff in error to discontinue without costs. *id*
15. Where a plaintiff in error dies pending a writ of error, judgment of affirmance or reversal will be directed to be entered as of

- a term when he was alive, *nunc pro tunc*,
King v. Dunn, 253
16. The service of an order staying further proceedings upon an execution, granted by a commissioner upon the allowance of a writ of error, does not operate as a *superseas* to discharge from custody a defendant who was arrested and committed to jail before the service of the order.
Sherrill v. Campbell, 287
17. A justice's judgment will not be reversed for the omission of the justice to call the plaintiff before receiving the verdict, if he be in fact present when the verdict is received, and does not submit to a nonsuit.
Oakley v. Van Horn, 305
18. Nor will it be reversed because costs are taxed over five dollars; the court will intend that there were foreign witnesses which increased the costs, or that the party was entitled to double costs. *id*
19. A court of common pleas have no power to reverse a justice's judgment on the ground that the verdict was against the weight of evidence. *id*
20. A collector of a school district, who makes a *levy* previous to a demand of the tax assessed, is liable to an action of trespass; but a justice's judgment in favor of the collector will not be reversed merely because it does not appear from the justice's return that the fact was proved that such demand was made previous to the levy; where the return is silent as to the proof or any objection to its omission, the legal intentment is that the proof was given or waived. *id*
21. A general exception to a charge delivered to a jury does not bring up any particular remark made by the judge, or any omission in such charge, unless the attention of the judge was directed to the point at the time. All that will be done on such an exception is, that the general bearing of the charge will be examined, and if that is not plainly injurious, or if in any legal mode of putting the matter the verdict must necessarily be the same, a new trial will not be granted, although the charge may in some particulars be erroneous. *Camden Rail Road v. Belknap*, 354
22. This court will not, upon a common law *certiorari*, review the decision of a justice of the peace in a cause before him, in refusing the defendant leave to withdraw a demurrer and to plead *de novo*, after judgment against him. *Miller v. Bush*, 651
23. A writ of error will not lie until a final determination of all the issues joined in the court below, unless from the record itself it is apparent that the judgment rendered in the court below disposes of the whole matter. *Peet v. McGrave*, 667
- See PRACTICE, 1.
- ### ESTOPPEL.
1. Where a debtor admits to a third person an existing balance due from him on a bond or other chose in action, and upon the strength of such admission such person takes an assignment of the bond or other chose in action, the debtor in a suit subsequently brought for the recovery of such balance is estopped from showing a claim against the original creditor, for the purpose of reducing the amount of the recovery, although the assignment was taken for a precedent debt. *Foster v. Newland*, 94
2. Where the maker of a note on its being presented to him by a person about to take a transfer of it, acknowledges himself to be holden for its payment, and the note is purchased for value, and the maker subsequently makes a payment upon it, he cannot afterwards sue to recover back the money thus paid, although he shows that he signed the note merely as surety, that it was paid by the principal, that it was over due at the time of the transfer, and that he made the acknowledgment of his liability in ignorance of the payment by the principal. *Petrie v. Feeter*, 172
- ### EVIDENCE.
1. Parol evidence is admissible at law to show that an instrument, purporting on its face to be a deed, is in fact a mortgage. *Swart v. Service*, 36
2. Such evidence may be given by a defendant in ejectment, without connecting himself with the title of the party executing the conveyance.
3. The deed being shown to be a mortgage, the defendant may insist upon lapse of time as raising the presumption of payment; such defence, however, is not necessary in such case, as showing the deed to be a mortgage bars a recovery. *id*
4. See the dissenting opinion of Mr. Justice BRANSON upon the principal point, that parol evidence is admissible at law to show a deed to be in fact a mortgage. *id*

5. A physician consulted by the defendant in an action on the case for seduction as to the means of producing an abortion, is not privileged from testifying, by the statute forbidding a disclosure of information received by a physician to enable him to prescribe for a patient. *Hewitt v. Prime*, 79
6. In an action by a bank against the endorser of a promissory note, the certificate of the notary of the bank, if he be a stockholder, is not admissible in evidence to prove presentment, protest and notice. *Herkimer Co. Bank v. Cox*, 119
7. One of several partners is a competent witness for his copartners in an action against them in which he is not made a defendant for a debt claimed to be due by the firm, if he be released by his copartners from all liability for contribution. *Lefferts v. De Mott*, 136
8. The king's bench of England holds that to render such a party competent, it is necessary in addition to the release of his copartners, that he release to them his interest in the surplus of the assets of the firm as far forth as the same may be affected by the demand in controversy: such release for that purpose is here held unnecessary. *id*
9. A commission issued to take the testimony of a witness, and the testimony taken under it, are not admissible in evidence, although returned by mail, addressed to the clerk, &c., unless an order or direction for its return in that manner was made by the officer settling the interrogatories. *Richardson v. Gere*, 156
10. Where personal property is sold on execution and left in the possession of the defendant in the execution, the latter is not a competent witness against the plaintiff in a subsequent controversy, between him and other creditors; though it seems he would be a competent witness for the plaintiff. *Gardener v. Tubbs*, 169
11. Where, however, the testimony of such witness was admitted, when called against the plaintiff, the court on a case made refused to grant a new trial, on account of the erroneous admission of such testimony, on the grounds that the defence was clearly sustained independent of such proof, and that there was no exception taken to the decision of the judge in admitting the testimony. *id*
12. On an application for a warrant against a person said to have absconded, leaving his wife or children chargeable to the public, the wife of such person is not a competent witness to prove the fact; but if a warrant be granted upon her testimony the proceeding is not void, it is voidable only, and a protection to all persons acting under its authority, although actors in the obtaining the warrant. *Downing v. Ruger*, 178
13. In an action on the case against the owners of a steamboat, for negligence in the navigating of the vessel, whereby the plaintiff was injured, the steersman of the boat is a competent witness for the defendant, if it appear that he acted under the immediate direction of the master of the boat. *Barnes v. Cole*, 188
14. Where, in the testimony of a witness taken under a commission, a mistake occurs in reference to the time of the transaction testified to, evidence is admissible to show the mistake and fix the true time. *McArthur v. Hurlbert*, 190
15. Where by the rules of pleading a defendant cannot plead matter which yet is essential to his defence, he may give it in evidence either to defeat or mitigate the plaintiff's claim. Under this rule any matter, whether it arise before or after suit brought, which is in its own nature admissible but cannot be pleaded, may be given in evidence on the general issue, or on the execution of a writ of inquiry. *Herkimer Manuf. and Hydraulic Co. v. Small*, 273
16. A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be permitted to testify that he would believe him on his oath. *The People v. Davis*, 309
17. A person *prima facie* liable for the payment of a debt is not a competent witness to sustain a suit in which the debt or a part of it is sought to be charged upon a third person, or upon a fund in his hands; and it was accordingly held that in an action by a workman or material-man, under the acts giving a lien to mechanics and others for work done or materials furnished in the erection of buildings in the city of New York, against the owner of such buildings, the contractor to whom credit was originally given is not a competent witness for the plaintiff. *Collins v. Ellis*, 397

18. Proof of the *hand-writing* of a party to negotiable paper—what will be deemed sufficient. *Cunningham v. Hudson River Bank*, 557
19. The mere fact that *checks* upon one bank had been passed to the credit of another, which had discounted and transmitted them to a correspondent for collection, is not enough to support the testimony of a witness who swears to the hand-writing of the drawer of a check, of which he has no knowledge other than that derived from its similarity to the signatures of the checks paid. *id*
20. *It seems*, that it is not enough to receive proof of *hand-writing*, that the witness has received letters from the party sought to be charged, upon which he has acted, unless such acts were subsequently recognized or ratified by the writer of the letters. *id*
21. Where a witness called to testify is of tender years, the party against whom he is called, may require that he shall be examined as to his understanding of the nature and obligations of an oath. *The People v. McNair*, 608
22. Where by a written agreement one party agreed to furnish another with water out of the mill *dam* sufficient to carry the *fulling* mill and *carding machine*, and at all times to have such a share of the water as would be sufficient to carry one wheel, when either of the wheels of the *grist* mill and *saw* mill were running, without any description of the location of the dam or mills, or allusion to the ownership of the same: it was held, in an action brought by the party who by the terms of the agreement was to be furnished with water, on a motion for a new trial, he having been nonsuited, that parol evidence was admissible to show the *location* and *ownership* of the dam and respective mills, in reference to which the agreement was made, to show that the party granting the privilege was, at the date of the agreement, the owner of a mill *dam*, a *grist* mill and *saw* mill, and that the other party at the same time was the owner of a *fulling* mill and *carding machine* in the vicinity of the other mills and dam, and that the respective parties owned no other mills or dam. *Fish v. Hubbard's adm'r*, 651
23. The above decision was made on the assumption that the declaration in the cause contained *averments* to which the proof offered would apply. *id*
24. The rule of Lord BACON, that "*ambigui-*

tas patens is never holpen by averment," considered and commented upon; and the doctrine advanced that the rule is necessarily subject to qualification, and has been so adjudged in a variety of cases referred to. *id*

See CHAMPERTY, 2. DEED, 7, 8.

EXECUTION.

See JUDGMENTS AND EXECUTION, 1, 2.
LANDLORD AND TENANT, 1, 2.

EXECUTORS AND ADMINISTRATORS.

An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a debt owing by the intestate, will not be allowed by the court in the exercise of its equitable powers, to set off such judgment. *Hills v. Tallman's adm'r*, 674

See ABSCONDING, CONCEALED AND NON-RESIDENT DEBTORS, 1, 2, 3. POWERS, 10.

F

FORGERY.

See CRIMINAL LAW.

FRAUDS.

A contract for the sale of lands is valid, within the *statute of frauds*, if it be signed by the party to be charged therewith; it is not necessary to its validity that it should be signed by both parties. *Edwards v. Farmers, &c. Loan Co.*, 467

G

GUARANTY.

1. Where a note against a third person is sold and transferred, and the transferor engages to *repay* the sum paid for the note by the transferee, in case the same cannot be collected of the maker by due course of law, it is no excuse for a neglect to attempt the collection, that the maker of the note was *insolvent*, where by the terms of the agreement the transferor is bound to pay the costs of any attempt to collect. *Eddy v. Stanton*, 555

2. Nor is it an *excuse* for not attempting the collection, that *thirty-one months* after the transfer, the transferor gave notice to the transferee that he would not be liable for costs which might be incurred in an attempt to collect the note, it being past maturity at the time of the transfer; the transferee in such case being chargeable with *laches*. *id*
3. Even a *release* to prosecute given at so late a day, will not help the transferee. *id*
4. A *guaranty* of a debt in the form of an *endorsement of a promissory note* is obligatory upon the guarantor; and in case of non-payment by the *debtor*, the *guarantor* is liable for the whole amount of the debt, and not merely for the sum received by him, with the interest thereof. *Oakley v. Boorman*, 588
2. The power thus exercised, though it should be admitted to have been illegally exercised, does not bring the case within the exception exempting the assurers from liability in case of loss arising from *usurped power*. The usurped power provided for in a policy means a *usurpation of the power of government*, and not a mere excess of jurisdiction by a lawful magistrate. *id*
3. Where an *insurance* was effected at New York on goods laden or to be laden on board the brig *Abeona*, from one port to another, and the goods were shipped in a vessel called the *Abeona*, which subsequently was lost, and it appearing that there were two vessels frequenting the port of New York called *Abeona*: one a *brig*, and the other a *schooner, half brig, brigantine or hermaphrodite brig*, and that the goods were embarked in the latter vessel, it was held, that *without proof* that the vessel in which the goods were laden was in the contemplation of the parties at the time of the contract, there was no room for the presumption that the parties meant a different vessel from that described in the policy. *Sea Ins. Co. v. Fowler*, 600

H

HUSBAND AND WIFE.

See PARTIES, 5.

I

IMPRISONMENT, ACT TO ABOLISH.

It seems, that in an action against two, if the defendants be *arrested*, and one of them was not subject to arrest, the party entitled to exemption from arrest may claim to be discharged. *Shannon v. Comstock*, 457

INDICTMENT. :

See CRIMINAL LAW.

INNKEEPER. .

See BAILMENT.

INSURANCE.

1. A *destruction* of merchandize insured, by the *blowing up with powder of a building in which it was stored*, under the direction of a chief magistrate of a city to prevent the spreading of a conflagration, was held to be a peril insured against in a policy against fire, and the insurers adjudged liable for the loss, where it appeared that the fire would have destroyed the building had it not been blown up. *City Fire Ins. Co. of N. Y. v. Corlies*, 367
1. In an action by a party who claims property as *exempt from execution* under the statute, the question whether he has or has not purposely reduced his *visible property* to such an amount as to claim the benefit of an exemption, with the intent to defraud his creditors, may properly be submitted to a jury; but a court upon evidence tending to such a conclusion ought not to nonsuit the plaintiff. *Brackett v. Watkins*, 68
2. The yarn possessed by a *householder* is exempt from execution to a certain amount, although he did not own the sheep upon which grew the wool used in the manufacture of the article. *id*
3. An *execution* which would be deemed *dormant* as against a *judgment creditor*, is *fraudulent* as against a *subsequent bona fide purchaser*. *Ball v. Shell*, 222
4. Where there are two executions in the hands of the sheriff, one against a *firm* consisting of two members, and the other against one of the members of the firm for his *individual debt*, upon both of which executions the *partnership property* is sold, and the sum raised by the sale is not suffi-

J

JUDGMENTS AND EXECUTIONS.

cient to satisfy both executions, the creditor holding the execution against the firm is entitled to a preference in the appropriation of the proceeds of sale; but where the property is sold on the execution against the *individual partner*, though after the delivery of the execution against both partners, the plaintiff in the execution on which the property was sold is entitled to the proceeds, if, at the time of the sale, sufficient time had not elapsed for advertisement and sale under the other execution. *Fenton v. Folger*, 676

5. Where one of two plaintiffs dies *after judgment*, execution may issue without *scire facias* as well in *ejectment* as in a *personal action*; but it must be in the joint names of both defendants. *Howell v. Eldridge*, 678

See BOND, 2, 3, 4. SALE OF CHATTELS, 4. SHERIFFS, 6, 7.

JUDICIAL OFFICERS.

See QUO WARRANTO.

JUSTICES' COURTS.

See COURTS OF JUSTICES OF THE PEACE.

L

LANDLORD AND TENANT.

1. To maintain an action against an officer, for refusing under an execution to levy and pay over rent claimed by a landlord, an affidavit of the truth of the claim must be produced to the officer; its non-production cannot be excused, although *waived* by the officer at the time of the claim, unless the tenant consent to a sale, to satisfy the claim of the landlord. *Farrington v. Bayley*, 65
2. In such action, evidence is admissible to show that *no agreement for the payment of rent* existed between the landlord and tenant. The mere occupation of premises, without an agreement to pay a liquidated sum as rent, does not give the landlord the right to require an officer to levy and pay over whatever sum he chooses to demand. *id*
3. After *distraining* for rent in arrear, though the distress be insufficient to satisfy the

rent, the landlord is not at liberty to institute proceedings for the removal of the tenant from the demised premises under the statute *authorizing summary proceedings* to recover the possession of land. *Wilder v. Ewbank*, 587

LIMITATIONS, STATUTE OF.

An agreement in writing entered into in 1822, to pay a sum certain with interest from 1st July, 1816, after deducting therefrom all equitable set-offs; the parties stipulating at the same time, when it should be convenient to make a final settlement, that the agreement then entered into might be taken up by giving a judgment at the option of the debtor, will not support an action either upon the *original indebtedness* or upon the *new obligation*, where the creditor does not commence his suit until after the lapse of six years and a plea of the *statute of limitations* is interposed. *Howe's ex'r v. Woodruff*, 640

M

MALICIOUS PROSECUTION.

See CASE, 4.

MANDAMUS.

1. A *mandamus* does not lie to a court of common pleas, directing the *vacatur* of a rule of that court, setting aside a *report of referees*, although the common pleas in the decision made by them clearly erred. *The People, ex rel. Fuller, v. Oneida Common Pleas*, 20
2. A *writ of mandamus* setting forth an appeal from a justice's judgment to a court of C. P., a reference there, a report of referees in favor of the relator, and an order of the court setting aside the report, shows a *prima facie* title to relief, was the remedy appropriate; but the proper remedy in such case is by *writ of error* and not by *mandamus*. *id*

MORTGAGE OF REAL ESTATE.

A tender *after the day* stipulated for the payment of a debt secured by mortgage, is equally effectual to remove the *lien* of the mortgage from the land as a tender *at the*

day, provided it be made before foreclosure; and if the mortgagee be in possession, he may, after the tender, be ousted by the mortgagor. If the tender be not made until after the day stipulated for payment, the mortgagor is bound to pay such costs as have accrued. *Edwards v. Farmers, &c. Loan Co.*, 467

See EVIDENCE, 1, 2, 3, 4.

MORTGAGE OF PERSONAL PROPERTY.

1. An *attachment* issued by a justice of the peace, founded upon an affidavit not sufficient to confer *jurisdiction*, is no bar to an action by a *mortgagee* of personal property against the plaintiff in the attachment for the taking of the property; and the latter cannot avail himself of the fact that *possession* did not accompany the *mortgage*. *Halsey v. Christie*, 9
2. A *bill of sale* of personal property, when possession does not accompany the transfer, has no preference over a *mortgage* of the same property subsequently executed, although that also be unaccompanied by a change of possession. The *mortgage* being *bona fide*, holds the property in preference to the *bill of sale*; a change of possession in respect to it being important only as it regards *creditors* and subsequent purchasers. *Bennet v. Earl*, 117
3. Where a *mortgage of personal property* given to secure the purchase money contains a clause that the property shall remain in the possession of the mortgagor until default in payment of the purchase money; but on the happening of such default, or in case the mortgagor attempt to remove or dispose of the property, giving the mortgagee the right to take possession of and sell it; the mortgagor is authorized upon the mortgagee removing the property from the county where the parties resided, to bring *replevin* to obtain possession thereof, although the time of payment of the mortgage moneys has not yet arrived. *Russell v. Butterfield*, 300
4. The *continuance of possession* in the mortgagor in such case, does not *per se* render the mortgage *void*, provided it be duly filed. If *fraudulent in fact*, such fraud may be shown; but it is not *constructively fraudulent*. *id*
5. If the mortgagor could be deemed entitled to recover as for the value of the property, all he would be entitled to would be

the value of *his interest* in the property, deducting the amount of the debt due to the mortgagee; or if his interest had in fact *ceased* at the time of the assessment of the value, by the mortgage having become absolute, he would not be entitled to recover any thing except, perhaps, *costs*; and it *seems*, that in this case, the rights of the parties as they existed at the commencement of the suit are not regarded. *id*

N

NEW TRIALS.

A *nonsuit* granted after evidence given on both sides, will not be set aside for that cause alone. *Fort v. Collins*, 109

NOTICE TO QUIT.

See EJECTMENT, 5. VENDOR AND VENDEE, 3.

O

OFFICERS.

See QUO WARRANTO.

P

PARENT AND CHILD.

See CASE, 5, 6, 7, 8.

PARTIES.

1. A *wharfinger* or *dock master* cannot maintain an action, in his own name, for the recovery of money *due for dockage* or wharfage, from the owner of a vessel frequenting the port of which he is wharfinger, although by the ordinances and statutes under which he acts the dockage and wharfage is directed to be paid to him, and he is required to collect the same. *Buckbee v. Brown*, 110
2. Remedies must be pursued in the name of the party in interest, and not in the name of the agent who made the contract, or whose duty it is to make the collection of moneys accruing under such contract. It

is otherwise as to *bailees*; in whose names, in many cases, actions may be maintained. *id*

3. In an action for dockage and wharfage of a public port, the defendant by way of *recoupment* may show that the port and wharves, during the accruing of the toll, were out of repair, whereby he sustained damage, &c. *id*

4. Where a contract for the sale of a lot of land was drawn up, in which a *husband* and *wife* and a *trustee* of the *wife* were described as the *parties* of the *first part*, and the purchasers as the *parties* of the *second part*, which on the part of the *parties* of the *first part* was executed only by the *husband* and *wife*, but the *trustee*, by an endorsement upon the back thereof, bound himself to do what should be necessary on his part to carry the contract into effect: *it was held*, that the two instruments, being parts of the same contract, might be declared upon as constituting together but one instrument, and that a suit might be maintained in the *joint names* of the *husband*, the *wife* and the *trustee*, and that had the name of the *trustee* been omitted, the declaration would have been fatally defective. *Smith v. Talcott*, 202

5. *It was further held*, inasmuch as it appeared that the *wife* had a *separate interest* in the subject matter of the contract, that she was properly made a party plaintiff. *id*

See CASE, 5, 6, 7, 8.

PARTITION.

It seems, that where a party claims an *undivided share* of a *tract of land* possessed by several defendants in *severalty*, and brings a *separate action* against each defendant and recovers, that commissioners appointed to make partition of the tract would be authorized to allot to the plaintiff in such actions a *portion of the whole tract in severalty*; and would not be limited to set off to him a portion of each separate recovery. *Rogers v. Arthur and others*, 593

PARTNERSHIP.

1. A declaration by a *partner*, though made during the existence of a partnership, that a liability incurred by a third person, at his request, in the borrowing of a sum of money, was for the benefit of the firm, is not

binding upon his co-partner. *Thorn v. Smith*, 365

2. Had a note been given in the *partnership name*, the rule would have been different; then the *onus* would have lain upon the co-partner to show that the note was given for the *individual debt* of the partner who gave it. *id*

See EVIDENCE, 7, 8. JUDGMENTS AND EXECUTIONS, 4.

PLEAS AND PLEADINGS.

1. A *defect in form* in a declaration or other pleading is cured by pleading over; but not a *defect in substance*. *White v. Delavan*, 26

2. Counts in *assumpsit* and *trover* cannot be joined in the same declaration. *Howe v. Cook*, 29

3. To justify the joinder of counts, it is not enough that they all relate to the *same subject matter*, and that the *evidence* is the *same* to support them; the counts to stand together must be in the *same form of action*. *id*

4. The manner in which the breach is alleged does not determine the *form of action*, as where, in a count on a *promise* implied on the hiring of a horse, it is alleged that the defendant, *contriving* and *intending* to *injure* the plaintiffs, *carelessly*, *negligently* and *improperly* drove, &c.; this verbiage of the count will not convert it into a count in *case*, if it be clearly founded upon a *breach of promise* as distinguished from a *breach of duty* incumbent upon a *bailee*. *id*

5. In a declaration on an attachment bond, it should be averred that the bond was ordered by the court to be delivered to the plaintiffs to be prosecuted and that an averment that it was ordered to be *delivered up to be prosecuted*, without naming the plaintiffs or authorizing them to prosecute, would not be held sufficient on demurrer. *Bank of Buffalo v. Boughton*, 57

6. A declaration averring a sale of goods to be paid for by a note of the purchaser with an *endorser satisfactory to the vendor*, is not supported by proof, that the goods were sold at auction on a notice in this form: "Terms of sale—over \$100, six months—satisfactory notes," without evidence that *satisfactory notes* according to *mercantile usage*, mean notes with *satisfactory endorsers*. *Hanna v. Mills*, 90

7. In an action of *trespass, assault and battery*, where the defendant justifies the assault on the ground that the plaintiff was making a noise and disturbance in his house, that he was requested to depart, and that on his refusal to do so the defendant laid hands on him *gently* to remove him—a replication that the plaintiff did not *wholly* refuse to depart, and that he remained no longer than was necessary to obtain his baggage, without excusing the noise *after the request*, is not a sufficient answer: besides, such replication is bad if it conclude to the *country*; it should conclude with a *verification*, so as to give the defendant an opportunity to answer. *Hanna v. Rust*, 149
8. So a replication containing new matter, alleging that the defendant of his *own wrong*, and with *more force and violence* than was necessary, committed the trespasses, should conclude with a *verification*. *id*
9. Where a plaintiff in such action, in his replication, varies the *place* of the committing of the trespasses from that alleged in the plea, he *must expressly allege that the trespasses as newly assigned are other and different trespasses from those mentioned in the plea*, or the replication will be adjudged bad. *id*
10. In an action against a *bank* for the non-payment of its notes, where the plaintiff demands *ten per cent. interest* by way of penalty, it is not necessary to warrant proof of the presentment of the bills and refusal to pay, that those facts should be *especially averred* in the declaration; the evidence is admissible under the *common money counts*. *Stowitts v. Bank of Troy*, 186
11. A *bill of particulars* in such case, setting forth copies of the notes, although not technically correct, will suffice, inasmuch as it apprises the defendants of the grounds of the plaintiff's claim. *id*
12. A plea, to a *count for money had and received* laying the indebtedness at \$800, that the money thus alleged to be received was paid by the plaintiff to the defendant as the consideration of a note of \$512 39, transferred by the latter to the former, is not a good answer to the count where no *fraud* is alleged, where the transaction is not alleged to have been *usurious*, and where, by the terms of the contract, the defendants assumed the hazard of the expense of collection. *Eddy v. Stantons*, 255
13. It seems that *payment* may be pleaded to *part* of a count, and the *general issue* as to the residue. *Herkimer Manuf. and Hydraulic Co. v. Small*, 273
14. In pleading a judgment rendered by a justice, it is not necessary, for the purpose of showing jurisdiction in the magistrate, to allege that a *plaint* was levied or *process* issued; it is enough if facts be averred showing that he had jurisdiction over the persons of the parties and the subject matter of the action. *Nicholl v. Mason*, 339
15. A suit cannot be *abated* by a plea that another action for the same cause was *afterwards* commenced; but a judgment in such second suit, in favor of the plaintiff, may be pleaded in *bar* of a recovery for the same cause of action. *id*
16. On demurrer to a plea *puis darrein continuance*, it cannot be objected that it is not verified by affidavit, nor that it is accompanied by another plea; such questions can be raised only on motion. *id*
17. A plea of *abatement* by two defendants, of a matter personal to only one of them, is bad. *Shannon v. Comstock*, 457
18. Where there is a covenant for the sale and purchase of a farm, the conveyance to be made and the consideration to be paid at a *future day*, if previous to the stipulated day the *purchaser* gives notice to the *vendor* that he has made up his mind to abandon the contract and not accept a deed, it is enough to support an action of covenant by the vendor to allege such notice; and it is not necessary in such case to aver a *tender* of a deed or *readiness to perform*. *North's adm'rs v. Pepper*, 636
19. In an action against the purchaser, the averment of the execution of a deed, notice to the purchaser and a demand of performance on his part, is equivalent to an averment of *tender* of the deed. *id*
20. It seems, that in such cases it is only necessary to aver a *readiness to perform*, and that a *tender of the deed* need not be alleged. *id*
21. Nor is it necessary that the plaintiff should allege that he had *title* to the premises agreed to be conveyed; if such defence exists it must be shown by plea. *id*

See PARTIES, 4. REPLEVIN, 1, 3.

POWERS.

1. In the exercise of a *public* as well as *private* authority, whether it be *ministerial* or *judicial*, all the persons to whom it is com-

- mitted must confer and act together unless there be a provision that a less number may proceed. Where the authority is public, and the number be such as to admit of a majority, such majority will bind the minority, after all have duly met and conferred. *Downing v. Ruger*, 178
2. Where the authority is conferred upon two, nothing can be done without the consent of both; yet where the authority is public, to prevent a failure of justice, or injury to the public, one may act without the other: as if one be dead, or interested, or absent. Upon this principle, one of two overseers of the poor is authorized to institute and carry on proceedings for the seizure of the property of one who has absconded, leaving his wife or child chargeable to the town. At all events, where only one overseer acts, the consent of the other will be presumed, upon the presumption in favor of the performance of official duty, that he had been conferred with and consulted as to the proceedings to be had. *id*
 3. So strong is the presumption in favor of the performance of official duty, that it always prevails, unless it be shown to be otherwise by direct and positive proof, coming from the mouths of witnesses whose relation to the transaction enables them to put a direct negative upon the presumption: thus in this case it was held, that the presumption of consent could be rebutted only by the testimony of the other overseer. *id*
 4. It seems that if the inhabitants of a town at their annual town meeting, were to elect but one instead of two overseers of the poor, that the one elected would have no authority to act for the want of a colleague; but that it would be otherwise if two were elected, and one should die or become disqualified. *id*
 5. Where an act of incorporation of a rail road company, appoints a certain number of commissioners to open books to receive subscriptions to the capital stock of the corporation, and to distribute the stock among the several subscribers in such manner as they shall deem most conducive to the interests of the corporation, making no provision that a majority shall constitute a quorum for the discharge of the duties entrusted to them, all must be present to hear and consult when they come to distribute the stock although a majority are competent to decide. In the distribution of the stock they act judicially; not so as to receiving subscriptions, in respect to which they act only ministerially, and it is not necessary for that purpose that even a majority should be present. *Crocker v. Crane*. 211
 6. The commissioners are not authorized in such case to receive the checks of the subscribers in payment of the sum required to be paid at the time of subscription; specie or its equivalent, current bills of specie-paying banks, must be demanded. Whether payments in checks are a compliance with the statute, is a question of law, and not of fact to be submitted to a jury. *id*
 7. A distribution of stock by commissioners, not sufficient in number to constitute a legal board, is *coram non jure* and void and a check, note or other instrument, given for the payment of the first instalment of stock subscribed for is void for the want of consideration. *id*
 8. A fraud practiced by one of the commissioners upon his co-commissioners, and upon a portion of the subscribers in the distribution of the stock, cannot be set up by a subscriber to vitiate the proceedings of the commissioners, the subscriber quoad the proceedings, is deemed a party to the adjudication; strangers may impeach a covinous judgment, but not parties. *id*
 9. Where a statute declares that "A. B. and C. and such other persons as shall hereafter become stockholders of said company, are hereby constituted a body corporate and politic by the name of," &c. no corporation exists if there be no stock distributed; the distribution of the stock, is a condition precedent to the existence of the corporation. *id*
 10. A power to an executor to sell and dispose of real estate granted by a will and to divide the proceeds among devisees to whom the estate was given by a previous clause of the same will cannot after the death of the executor be executed by an administrator cum testamento annexo, notwithstanding the provisions of the revised statutes, that "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators of such will shall have the rights and powers and be subject to the same duties as if they had been named executors in such will." *Conklin v. Egerton's adm'r*, 430
- PRACTICE.
1. Where a cause which has been removed into this court by writ of error, is brought

on to argument or submitted, the plaintiff must make up and produce *error books*, or the writ of error will be *dismissed*; it is not enough that a copy of the *judgment roll* in the, court below and a *bill of exceptions* be presented. *Williams v. Newcomb*, 67

2. On the trial of a cause a party is not at liberty to object to the *generality* of a *bill of particulars*; if the *cause of action* or *matter of defence* be embraced in the bill, though in the most general terms, the evidence offered in support of the allegations of the party is admissible, the same as under a declaration on the money counts. The party, if dissatisfied with the bill, should have applied for *further particulars*. *Barnes v. Henshaw*, 426

PRINCIPAL AND AGENT.

1. A *factor* or purchasing agent, in actual possession of two parcels of goods obtained under distinct orders, for both of which he is in advance, although paid for one of the parcels, may avail himself of the doctrine of *lien* in respect to the whole of the property. *Brooks v. Bryce*, 14
2. It seems that though only one of the parcels had come to hand, and he had been paid his advances on it, he might still have set up a *lien* upon the parcel received for his *liabilities* incurred in respect to the other parcel. *id*
3. The acceptance of a draft payable at a future day, in payment of one parcel, is not a waiver of the *lien* of the factor, especially when in the receipt of the draft it is declared that it is to be in full *when paid*. *id*
4. A *general agent* entrusted by his *principal* with power to make and enter into contracts for the purchase of grain, has power to modify or waive a contract made by him in respect to such grain. *Anderson v. Coonly* 279
5. The *authority* of an agent being limited to a *particular business*, does not make it *special*; it may be as general in regard to that, as if its range was unlimited. *id*
6. Where a quantity of butter was put into the hands of an agent who was proceeding to the city of New York to sell, with directions "to do the best he could with it; to do as well with it as if it was his own;" and the agent, after endeavoring in vain to dispose of it in New York at a fair price, finding the market dull, sent the butter of

his employer, *together with his own*, to a market at the south; it was held, that the judge was not authorized to instruct the jury that the agent was bound to sell in New York and not elsewhere; but that the question of excess of authority should have been submitted to the jury upon the evidence as to the usual course of business in relation to such matters. *McMorris v. Simpson*, 610

7. Ordinarily an action of *trover* will not lie by a *principal* against his *agent*, unless it appear that the agent has converted the property of his principal to his own use, or disposed of it contrary to his own instructions; there must be some *act* on the part of the agent; a mere *omission* of duty is not enough, though the property be lost in consequence of the neglect. Nor will *trover* lie where the agent, though wanting in good faith, has acted within the general scope of his powers. *id*

QUO WARRANTO.

1. Where to an information in the nature of a *quo warranto* filed against *individuals* calling upon them to show cause by what warrant they exercise the *franchise* of maintaining a bridge across a navigable river and exacting *toll* from passengers, the defendants answer that they do so by virtue of an act of the legislature, authorizing the erection of a bridge in a specific form, and that they have in all respects conformed to the requirements of the act granting the franchise, upon which allegation issue is taken and found against them by the jury, judgment of ouster, follows of course. *The People, ex rel. Taylor, v. Thompson*, 235
2. The court will not in such case deem the verdict *imperfect*, and refuse to render judgment, because the jury have not found that the *variation* or *departure* from the requirements of the statute was in a point *material*, or that it was the *wanton* act of the grantees, or that it was productive of injury to the public. If any excuse existed proper for the consideration of the jury or of the court, which might have produced a favorable result to the defendants, it was held, is should have been alleged by way of pleading, and placed upon the record, so that the court might have passed upon its sufficiency; but where the defendants placed their defence, as in this case, upon a strict compliance with the requirements

of the statute creating the franchise, and there was no exception taken as to the rejection of evidence or as to the charge of the judge, the court refused to make any intendments in favor of the defendants. *id*

3. It was further held, that this was not a private franchise, but was a franchise of a public nature in which the public at large had an interest, and that an information in the nature of a quo warranto might be filed in the name of the people on the relation of any aggrieved citizen; that in a case of this kind a quo warranto, or information in the nature of a quo warranto, was the appropriate remedy, and that it was not taken away by the fact that a bond had been executed as security for the faithful performance of the conditions upon which the grant was made; such bond being merely cumulative. *id*

4. It was further held, although the bridge was built in conformity to the requirements of the act for granting the franchise, and so continued for the space of twenty-nine years, still it appearing that for ten years subsequent to such time, the grantees had failed to comply with such requirements—that the conditions prescribed were continuing conditions, that the non-compliance with them was a *misuser*, and that the defendants had incurred a forfeiture of the franchise. *id*

5. Where a county is divided and two separate and distinct counties formed out of it by act of the legislature, to one of which a new name is given, whilst the other it is declared shall be and remain a separate and distinct county by the name of the county as it existed previous to the division, the judges of the county courts appointed previous to the division who happen to reside in that portion of the territory distinguished as a county with a new name, under the operation of the act requiring judges of county courts to reside within the county for which they are appointed, lose their offices, and are no longer competent to act under their commissions; whilst those of the judges who happen to reside in the portion of the territory which retains the original name continue in office until the expiration of the term for which they were originally appointed. *The People v. Morrill*, 563

6. It seems that it would have been competent to the legislature, by express enactment, to have continued the judges whose residence happened to be in the new county, until the expiration of their constitutional term of office; but that by remaining silent the office is gone. *id*

7. A county may be divided by the legislature into two or more counties by a mere majority vote; it is not necessary that a bill for such purpose should receive the assent of two thirds of all the members. *id*

R

RAIL ROAD COMPANIES.

See POWERS, 5, 6, 7, 8, 9.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 1.

REFERENCE.

See MANDAMUS, 1, 2.

RELEASE.

A covenant by the holder of a promissory note that he will not sue or levy upon the property of one of several makers of the note entered into after the commencement of a suit; and in case any proceeding at law or equity he had, continued or prosecuted, that the covenant shall be deemed to all intents and purposes a release to such maker, is notwithstanding the terms of the instrument a mere covenant not to sue, and cannot be pleaded as a release in bar of a recovery against all the makers. *Couch v. Mills*. 424

See BILLS OF EXCHANGE, &c. 3.

REPLEVIN.

1. Where a defendant in *replevin* pleads property in a third person, traversing the plaintiff's right, a replication traversing the right of such third person, and setting up a general property in another, and a special property in the plaintiff, is bad in three particulars: 1. for not taking issue upon the defendant's traverse; 2. for traversing matter of inducement; and 3. if such matter could be replied, for alleging the evidence of title, instead of the legal effect of the evidence. The proper course for the plaintiff would have been to have accepted the issue tendered, and to have re-affirmed his title, concluding to the country. *Prosser v. Woodward*, 205

2. It seems, that in replevin, a plea of property in a third person, found for the defendant, entitles him to a return, although he offers no proof connecting himself with the title of such third person. Such defence, however, is not allowed in *trespass* or *trover*.
id

3. Whether a declaration in replevin, merely alleging that the plaintiff was entitled to the possession of the goods, instead of charging the taking of goods of the plaintiff, is good, *quere*.
id

See DAMAGES, 1, 2, 3. ERROR, 2. SALE OF CHATTELS, 2.

§

SALE OF CHATTELS.

1. Where a contract was made between a miller and other persons, for the manufacture of wheat into flour, he engaging on his part for every four bushels and 55 pounds of wheat received, to deliver one barrel of superfine flour, and there was no stipulation or understanding that the wheat delivered should be kept *separate* from other grain, or that the *identical* wheat should be returned in the form of flour; it was held, that the transaction between the parties constituted a *sale* and not a *bailment*, and that the owners of the wheat could not maintain an action for the conversion of the flour manufactured from the wheat. *Smith v. Clark*,
83

2. It was further held in this case, that even had the flour after its manufacture been delivered by the miller to the other parties, but permitted to remain in his possession, that they could not maintain an action of replevin in the *cepit* against any person, who subsequently came to the possession of the same by *delivery* from the miller; to charge such person, the action should have been in the *detinet* only.
id

3. Where property is bought at a sheriff's sale by the plaintiff in an execution and left in the possession of the defendant, without any good excuse shown, the sale is *void* as against other creditors of the defendant, notwithstanding that the plaintiff subsequently and before the levying of an execution on the part of other creditors, reduce

the property to his actual possession. *Gardener v. Tubbs*,
169

SCHOOL DISTRICTS.

See ERROR, 17.

SCIRE FACIAS.

See JUDGMENTS, &c., 4.

SET-OFF.

See EXECUTORS AND ADMINISTRATORS.

SHERIFFS.

1. On the election or appointment of a *new* sheriff, and the service of a certificate of the county clerk that the *new* sheriff has qualified and given the security required by law, the powers of the *old* sheriff cease within ten days after the service of such certificate, and all prisoners who are *not* assigned within that term, are at liberty to go at large; the *new* sheriff has no control over them, and the powers of the *old* sheriff are at an end. The latter cannot in such case, even maintain an action on a bond for the liberties given by a prisoner not assigned. *Hinde v. Doubleday*,
223
2. In an action on a bond for the liberties, a plea that the prisoner remained a true and faithful prisoner to be a valid bar, must cover the whole time during which the sheriff remained liable; it must, as in this case, be not only whilst he continued in office, and until a successor was appointed, but until the prisoners were assigned, or the expiration of ten days after the service of the certificate of the county clerk. *id*
3. A plea that the prisoner escaped *after* the assignment by the *old* to the *new* sheriff, is a good bar to an action on a bond for the limits, and it is no answer to such plea that the prisoner was *not* assigned by the *old* sheriff, where no excuse for the omission is offered. Whether the omission to assign can be excused, *quere*.
id
4. If the *old* sheriff has a right of action on the limit bond, a recovery against the *new* sheriff for the *same* escape, is no bar. Nor is a voluntary return of the prisoner before suit brought against the sheriff, a bar; a limit bond is not strictly a bond of indem-

- nity; the sheriff being liable to an action when an escape happens, may forthwith bring his suit. *id*
5. In a suit on a bond for the liberties, it is no defence that an action was brought against the sheriff within a year after the escape; the sheriff may avail himself of such short limitation in an action against him, but not the obligors of the bond. *id*
 6. An action does not lie against an officer for not paying over money collected by him on execution, where he has been sued and a recovery had against him for selling property, by the sale of which the money collected by him was made, where such recovery is equal to or exceeds the amount of the execution. *Newland v. Baker*, 264
 7. And such action does not lie, although the plaintiff in the execution on the delivery of the process executed a bond of indemnity to the officer, and notwithstanding, that the officer has brought an action upon such bond. *id*
 8. A sheriff who holds an execution against the property of the defendant in the process, is not bound, it seems, to suspend proceedings on the production to him of an insolvent's discharge granted to the defendant; at all events, if he do so, he incurs the peril of an action against him, if the discharge be shown to be void. *Orange County Bank v. Dubois*, 351
 9. In an action against a sheriff who under such circumstances suspended proceedings, and did not return the execution, and the jury found that the property of which the defendant was possessed belonged to a third person, and consequently that the plaintiff was not entitled to recover, the court refused to grant a new trial; although the verdict was not warranted by the evidence—it appearing that the sheriff on being served with the discharge, informed the plaintiff's attorney of the fact and desired his instructions; that no instructions were given; and that the defendant in the execution had become insolvent. *id*

See Bond, 2, 3, 4.

SHIPS AND VESSELS, PROCEEDINGS AGAINST.

1. In an action on a bond given to relieve from arrest a ship or vessel proceeded against under the statute, the plaintiff is bound not only to state his demand in his declaration, but to prove it on the trial of

the cause, notwithstanding that the defendant pleads no other plea than non est factum and general performance; it is not enough that he establish his claim before the commissioner granting the process. *Wakeman v. Newton*, 260

2. A plea of performance, whether general or special, of the obligations specified in the condition of the bond, is an inappropriate plea in an action on such bond, and it seems, would be the subject of demurrer; when, however, the plaintiff takes issue upon a plea of general performance by replying generally, denying the performance, the plea will be regarded as setting up a special performance, and the defendant will be allowed to give any evidence tending to show that the plaintiff is not entitled to recover. *id*

SLANDER.

1. An action of slander lies where the words are, *you will steal*, and it is averred in the declaration that the defendant by the speaking of the words meant and intended to have it understood and believed, that the defendant had been guilty of larceny. *Cornelius v. Van Slyck*, 70
2. Such an averment in the declaration following immediately after the setting forth of the words spoken, was in this case held sufficient. *id*
3. An action on the case for a libel lies against a party making a communication in writing to the head of a department of the government, charging a subordinate officer of such department with *peculation* and fraud of various kinds, where such subordinate officer is subject to removal by the officer to whom the communication is addressed; but such action, though in form for a libel, is in the nature of an action for a malicious prosecution, and the proof to sustain it must be the same as is required in the latter action, i. e. the plaintiff is bound to show both malice and a want of probable cause. *Howard v. Thompson*, 319
4. Where the conduct of a public officer, against whom a complaint is made, be such as with the attendant circumstances to excite the honest suspicion of a citizen that the officer is chargeable with a want of fidelity to the trusts reposed in him, or with fraud as respects the government, and an action is brought against a citizen for a representation made by him respect-

- ing such officer, the question of *probable cause* should be submitted to the jury. *id*
5. Even after a notice of justification, the proof of which is abandoned on the trial, the defendant may, in an action like this, rest his defence upon the ground of *probable cause*; he is precluded from doing so, under such circumstances, only where *probable cause* is mere matter of mitigation. *id*

STATUTES, CONSTRUCTION OF.

1. In the construction of a statute, if the meaning of the legislature be manifest, the intention will be carried into effect, although apt words are not used in the act *Crocker v. Crane*, 211
2. It is a rule of construction, that a mere change of phraseology in a revision of the statutes, will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature. *Ex parte Brown*, 316
3. Where by the statute law of a state in which the judgment is rendered, the plaintiff is authorized to agree with the defendant after the latter is arrested on a ca sa. that he may go at large without payment of the debt, and yet, that the plaintiff may subsequently proceed against such defendant by a new execution or such other process as the nature of the case may require; it was held, that within the equity of the statute the plaintiff was entitled to maintain an action of debt on the judgment, where the defendant had departed from the state in which the judgment was rendered and had come to reside within this state. *Simonton v. Barrell*, 362

SUNDAY, ACT FOR OBSERVANCE OF.

1. Where a magistrate, on complaint of a violation of the statute for the observance of *Sunday*, issued a warrant, had the person complained of arrested, and imposed a fine upon him, it was held that he was not liable in an action of trespass, although he might have *mishandled* as to the facts alleged being an offence within the meaning of the statute. The complaint here was that the party, "on the first day of the week called *Sunday*, circulated a memorial to the legislature" without stating the purport or object of the paper circulated *Stewart v. Hawley*, 552

2. So it was also held, that the constable executing the warrant was not liable in trespass. *id*

T

TENANTS IN COMMON.

Trover may be maintained by one tenant in common against another, where the latter sells the whole property held in common, although it be not removed beyond the reach of the plaintiff; he may take possession of the property when opportunity offers, but he has an election to do so, or bring trover. *White v. Osborn*, 72

TENDER.

See MORTGAGE OF REAL ESTATE.

TENURE OF OFFICE.

See QUO WARRANTO.

TOWN AND COUNTY OFFICERS.

See POWERS, 1, 2, 3, 4. SHERIFFS, 1.

TRESPASS.

1. In trespass *quare clausum fregit*, where the plaintiff declares setting out the close with abutments, it is not necessary that he should, on the trial, show title to every part of it; it is enough if he show title to that part of the close in which the trespass was committed. *King v. Dunn*, 253
2. In trover or trespass, if the property be taken by a stranger, the special property man may recover the whole value, holding the balance beyond his own interest in trust for the general owner; but if the suit be against the latter, he is entitled to a deduction of the value of his interest. *id*
3. In an action of trespass for killing a dog, where the defence was that the dog was ferocious and in the habit of attacking individuals, it was held, that it was not necessary to prove a *scienter* as to the plaintiff, to support the defence. *Maxwell v. Palmerton*, 407

TROVER.

See PRINCIPAL AND AGENT, 6, 7. TENANTS
IN COMMON.

TRUSTS.

1. Where a trust of lands is wholly nominal, the trust becomes executed by the statute in the cestui que trust, who may maintain ejectment for the recovery of the lands in his own name without a previous conveyance from the trustee. *Welch v. Allen*, 147
2. Where lands are granted to a trustee without words of perpetuity, he will by implication of law take a fee, if such estate be necessary to fulfil the objects of the trust. *id*
3. Where a trustee was directed to dispose of the lands granted to him and to apply the proceeds to the support of a certain individual and his family, and after the decease of such individual to pay the residue, if any, to his legal representatives; it was held, in an action between the heir at law and mere naked possessors, that on the death of such individual the land passed to his heir at law, it not appearing that it had been disposed of by the trustee. *id*

U

USURY.

1. Where the holder of a note payable to himself, requested another person to procure the note to be discounted, who by placing his name upon it as an endorser procured it to be done, received the avails and paid over the same except the sum of thirty dollars, which he retained for his endorsement and trouble in the matter; it was held, that the transaction was usurious, and that

the usury might be alleged in bar of a recovery of a subsequently substituted note. *Steele v. Whipple*, 103

2. The transfer and guaranty of a note for a larger sum in consideration of a less sum, is not per se usurious; the guarantor in such case, when called on for payment, being liable only to refund the amount received by him, with the interest thereof. *Masuzan v. Mead*, 285

V

VARIANCE.

See PLEAS AND PLEADINGS, 5.

VENDOR AND VENDEE.

1. Where a contract is entered into for the sale of land, by the terms of which the purchaser is to pay \$500 down and enter into immediate possession of the premises, a second instalment to be paid in ten months, and the residue at deferred periods, and the vendor is to execute a deed in two months; the vendor is entitled to maintain an action of ejectment on the default of the purchaser to pay the second instalment, although the first instalment was punctually paid, and the vendor did not before bringing suit tender a deed. *Wright v. Moore*, 230
2. The vendor in such case could not maintain covenant for the purchase money, but may bring ejectment; the remedy of the defendant, if any, is in equity. *id*
3. It seems that in a case like this, notice to quit, before bringing suit, is not necessary. *id*

See PLEAS AND PLEADINGS, 7, 8, 9, 10.



